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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JOHN McLEMORE,

Petitioner,

vs.

WFAA-TV, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a defamation case, a person may be treated as a public figure when he voluntarily injects himself into a public controversy. What does it mean for one to "voluntarily inject himself" into a public controversy?

2. In a defamation case, a person may become a public figure involuntarily. What must occur for one to become an involuntary public figure?

LIST OF INTERESTED PARTIES

Pursuant to Rule 14.1(b) of the Supreme Court Rules, John McLemore hereby identifies those persons, associations of persons, or other entities that are, or may be interested in the outcome of this case.

Parties to this Petition:

John McLemore Waco, Texas	Plaintiff / Petitioner
WFAA-TV, Inc. Dallas, Texas	Defendant / Respondent

Additional Parties in the Trial Court:

Kathy Walt, f/k/a Kathy Fair Houston, Texas	Defendant (Trial Court)
The Hearst Corporation, d/b/a The Houston Chronicle	Defendant (Trial Court)

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To the Supreme Court of the United States:

Comes Now John McLemore, the Petitioner in this case, and files this Petition for Writ of Certiorari.

OPINIONS BELOW

The Texas Court of Appeals for the Tenth Supreme Judicial District issued an opinion that is now reported at 1998 WL 795071 (Appendix C).

After that decision, the Texas Supreme Court granted a Petition for Review, and issued an opinion that is reported at 978 S.W. 2d 568 (Appendix A).

STATEMENT OF JURISDICTION

The judgment of the Texas Supreme Court was entered on September 24, 1998. McLemore sought a timely rehearing of the decision of the Texas Supreme Court, but his request for rehearing was denied on November 12, 1998 (Appendix E).

Jurisdiction of this Court is founded on 28 U.S.C. § 1257. Under Rule 10 of the Supreme Court Rules, this Court should grant this Petition. The decision of the Texas Supreme Court decided important questions of federal law that had not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISION INVOLVED

Amendment I, United States Constitution —

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Course of Proceedings & Disposition of the Case Below

McLemore filed suit against both WFAA and a Houston newspaper — *The Houston Chronicle*. He claimed that both of them had defamed him when they reported that he had given the Branch Davidians advance notice — a tip — that the ATF was about to raid the Davidian compound near Waco. Both WFAA and the *Chronicle* filed Motions for Summary Judgment asserting that McLemore was a public figure who bore the burden of proving the reports were false and made with malice.

McLemore responded to both Motions with evidence and argument. He specifically raised the argument that he was not a public figure. However, the Trial Court granted the Motion for Summary Judgment filed by the *Chronicle*. The Trial Court denied the Motion for Summary Judgment filed by WFAA.

WFAA appealed to the intermediate court of appeals in Texas. There the denial of the Motion for Summary Judgment was affirmed. The Texas Court of Appeals held that McLemore was not a public figure, and that his burden was only to show negligence (which WFAA had not negated by its summary judgment evidence). According to the Texas Court of Appeals, McLemore was not a public figure because his journalistic ethics were not an issue of public concern. The issue of public concern about which WFAA could rightfully comment was the raid at the Branch Davidian compound, not the reputation of the messenger.

WFAA appealed again — this time seeking discretionary review from the Texas Supreme Court. The Texas Supreme Court decided to hear the case, and decided that McLemore was, indeed, a public figure. The Texas Supreme Court held that McLemore was a public figure because he had voluntarily injected himself into the controversy. However, the Texas Supreme Court did not focus on the substance of what McLemore had to say. Instead, it was his presence at the event, and the fact that he repeated his eyewitness observations on television that was McLemore's downfall. Because he chose to answer questions, he became a public figure. Based on that finding, the Texas Supreme Court held that McLemore had not proven malice, and the Court rendered judgment against McLemore.

B. Statement of Facts

On February 28, 1993, ATF agents sought to search the Mount Carmel compound occupied by the Branch Davidians, a small religious group. The compound near Waco, Texas and the messianic leader of the Branch Davidians — David Koresh — had been the subject of newspaper stories appearing in the *Waco Tribune-Herald* the previous day. The newspaper stories claimed that Koresh thought he was God, that he believed in whipping children as young as 8 months old, that he had fathered children with underage girls living at the compound, and that he had stockpiled an arsenal of illegal weapons.

Dan Mulloney, a KWTX photographer, had reliable information that law enforcement officers were going to raid Mount Carmel and

seize the Davidians' cache of unlawful arms on Sunday morning. A local newspaper reporter had tipped off Mulloney to the raid, and his friend at a local ambulance company, which had been put on alert, confirmed it.

McLemore figured that he and Mulloney would get some video footage of cops kicking in doors and coming out with armfuls of rifles — not a bad story for the small TV market of Waco, where McLemore, then 29, had restlessly paid his dues for the past five years.

KWTX dispatched McLemore and Dan Mulloney, a cameraman, in one truck and Jim Peeler, another cameraman, in a second truck to report on the raid. The *Tribune-Herald* sent three vehicles containing seven reporters to Mount Carmel to cover the events.

After waiting near the compound for some time, Mulloney and McLemore noticed two trucks pulling tarp-covered cattle trailers barreling past them. The trailers were filled with agents from the Federal Bureau of Alcohol, Tobacco, and Firearms, who were clad in flak jackets and helmets.

After the trucks passed Mulloney and McLemore, the two hopped into their Bronco and followed the trailers. Mulloney and McLemore decided to take their chances and follow the trailers as far as they could. The Bronco was about halfway down the compound driveway when the agents threw open the tarps and scrambled for position.

Then all hell broke loose. A gunfight erupted in the compound. Four ATF agents and three Davidians were killed, and twenty ATF agents were wounded during the shooting. McLemore and Mulloney were the only media representatives actually in the midst of the firefight. Mulloney filmed the events and McLemore reported live from the scene of the gun battle.

Two days after the gunfight, the media reports began to focus on the causes of the gunfight. Two days after that, a *Chronicle* reporter appeared on a network television show — "Nightline".

During the show, the role of the media in the failure of the ATF raid was discussed. The Nightline host asked what went wrong. The *Chronicle* reporter said that it was too early to tell what went wrong, but that there had been questions raised about the role of the media. The answer to these questions was that nobody knew the role of the media. However, the *Chronicle* reporter went on to quote anonymous sources who said

that law enforcement officers "blamed the media, particularly the local media".

It was the *Chronicle* reporter who first reported a rumor (never later confirmed) that reporters for the TV station (which had to include either McLemore, Mulloney or Peeler — two of whom were carrying incredibly large cameras and related equipment) were "hiding in the trees when federal agents arrived." The *Chronicle* reporter also said that her sources would not say "publicly" that they had been set up, but they did believe they had been "set up" (another rumor never later confirmed).

To McLemore, that just wasn't the way it happened. He hadn't hung from any trees, and at no time did he tip off any Davidians — intentionally or by accident. He and Mulloney didn't enter the compound until after the ATF agents arrived. They had parked their Bronco, heard the hail of gunfire, and somehow managed to get their camera on the ground and rolling. McLemore even risked getting shot to help wounded ATF agents by running back to the Bronco to call for an ambulance.

Twice, McLemore offered to ferry the remaining officers to safety, but they declined. He made a last offer before deciding to leave. When it was clear no more help was on the way, they finally agreed to go with him. An agent with a leg wound and another with an injured collarbone got into the Bronco along with several other agents. When the truck was full, they wrapped an agent with a bloody chest wound in a blanket and placed him on the hood of the truck. Another agent stood on the truck's floorboard and hung onto the open door while directing McLemore out of the compound.

McLemore broadcast, live, a detailed and composed account of the raid. Just moments later he was interviewed live by WFAA, KWTX's sister station.

After he filed his story, reporters on the scene surrounded him and began interviewing him about what he had seen and done during the raid. Throughout the afternoon and evening, journalists from across the country streamed into Waco; many of them also sought out McLemore for his eyewitness accounts, which appeared in newspapers and on news shows worldwide. But, contrary to the assertions of WFAA, McLemore did not "call a news conference". The next day, ATF Director Steve Higgins called McLemore to personally thank him for his bravery and assistance.

But this was nothing like what was being reported on Nightline. In fact, as soon as the Nightline broadcast concluded, KWTX began to receive calls critical of McLemore's role in the raid. Many callers immediately believed that the Nightline report referred to McLemore and that he was responsible for the disastrous results of the ATF raid. One caller said that the "blood of the ATF agents is on McLemore's hands."

When Nightline dropped the inquiry relating to McLemore, there was nothing of substance to report at the Davidian compound. There, both law enforcement and the media were less than a week into the siege that was to last over 50 days. So, with nothing to report, WFAA picked up the more provocative part of the story by focusing on the Nightline angle and the role of John McLemore. WFAA acknowledged that it had no new information about McLemore's role, but repeated and quoted from the *Chronicle* reports that had aired days earlier. When WFAA directly asked what information had been learned about a "tip" to the Davidians or to a "set-up", their reporter was squarely told: "We don't have any information on that."

WFAA continued by replaying portions of the Nightline interview, but added to the interview by showing video of McLemore at the time that the voice-over discussed a "tip-off". Even after being told that there was "no information" about a "tip-off", WFAA repeated the rumor that there was a TV reporter "hiding in the trees".

If this did not squarely accuse McLemore, WFAA's next statement did. Valeri Williams, the WFAA reporter said:

> The only reporters at the scene Sunday morning were Steve [sic] McLemore and a television photographer from KWTX-TV in Waco and one or two reporters from the local newspaper. McLemore's news unit was used to transport some of the wounded agents. Currently his bosses are consulting with attorneys before issuing a statement. But the editor-in-chief of the Waco Tribune Herald issued this statement:
>
> > I do not know what local reporter that was being referred to, but it sounds absolutely ridiculous to me. Our reporters would not do such a thing.
>
> Now perhaps all of the warning signs were there that this raid was a set up. *If it's true that reporters were spotted*

> *hanging from trees why didn't authorities stop the raid before agents ever went through the front door? On the other hand, if reporters covertly tipped the cult off to gain a story not only have they broken every journalistic ethic but they could be found guilty of obstruction of justice.* (emp. added.)

Williams made essentially the same statements in another newscast that same evening, but added:

> Now the only reporters at the scene Sunday morning were John McLemore [finally getting the name right] and a photographer from KWTX-TV in Waco along with one or two reporters from the local newspaper. McLemore's news unit was used to transport some of the wounded agents. Wednesday night McLemore's station is demanded [sic] a retraction from Nightline saying, "the rumor that a Waco reporter had tipped the cult about the raid in exchange for permission to be on the compound grounds was completely false. No reporter or photographer from local media was on the compound grounds prior to the raid." The Waco Tribune Herald has also called the charges "ridiculous." Nightline's answer: "We are looking at the charges with our legal department and have no response tonight."

WFAA again was faced with information that what they were reporting was false, and unfounded, but its report continued —

> Despite repeated questions at their news conference federal officials were unwilling to place any public blame. Now perhaps all of the warning signs were there that this raid was a set up. If it's true that reporters were spotted hanging from trees why didn't authorities stop the raid before agents ever went through the front door? On the other hand, if reporters covertly tipped the cult off to gain a story not only have they broken every journalistic ethic but they could be found guilty of obstruction of justice.

At every juncture where WFAA attempted to verify what it was reporting about McLemore, it was told "there is no information on that subject", or that the information being reported was false. WFAA persisting in making the report, and in identifying McLemore. At the time of the WFAA report, there was no investigation being conducted or reported. Nobody was even alleging an act of wrongdoing except for

WFAA and the *Chronicle*. It is obvious that WFAA wanted to report something different than what other media outlets were saying about the standoff. (After all, nothing was really happening at the Branch Davidian compound).

So, in a span of only 48 hours, McLemore went from fearless reporter and good Samaritan to pariah, hounded by viewers who blamed him for the bloodbath at Mount Carmel, and viewed suspiciously by other members of the press.

But once his integrity came under scrutiny, he was at a loss for what to do. McLemore's station threatened to fire him if he spoke publicly about the media reports. Its management issued a statement denying its reporter was on the grounds of the compound before agents arrived and asked Nightline for a retraction. Neither ABC nor WFAA retracted the allegations. Nor would they bother to report that a U.S Treasury Department investigation of the raid exonerated McLemore.

The report, issued more than six months after the bloody ambush and the resulting carnage of the Davidians, concluded that McLemore's colleague, photographer Jim Peeler, had inadvertently tipped off the Davidians when he got lost on his way to the compound.

WFAA picked the story about McLemore because it was provocative and it obviously did not care if it could support its report with any objective facts. All that WFAA had was a rumor or suspicion voiced to someone else days earlier. That rumor had died a natural death because there was no substance or truth to the rumor. Even if somebody told the *Chronicle* reporter that there was a set up; that there were TV reporters hiding in the trees; that the TV reporters had permission from the Davidians to arrive early, none of this had panned out in two days of constant questioning. Not a single witness had appeared to verify these reported allegations despite the presence of literally hundreds of law enforcement personnel to check into it. Equally important, when WFAA inquired about any investigation into the local media, and its role in the failed raid, it was NOT told that an investigation was under way. Instead, it was told that there was no information. And despite knowing that its reports would ruin the reputation of another person, WFAA made its reports anyway.

ARGUMENT AND AUTHORITIES

Question No. 1:

In a defamation case, a person may be treated as a public figure when he voluntarily injects himself into a public controversy. What does it mean for one to "voluntarily inject himself" into a public controversy?

Ultimately this case seeks a decision about the burden of proof required of a plaintiff in a defamation case. If McLemore is obliged to prove "actual malice" under *New York Times v. Sullivan*, 376 U.S. 254 (1964), then he will lose, like most every other person who has lost his good name to erroneous media coverage. McLemore will have to meet the *New York Times* standard if he is a "public figure". If McLemore is not a public figure, then he will be permitted to try his case, and a jury will decide whether WFAA was negligent. Negligence is the standard under Texas law. *See* § 73.001, *Tex. Civ. Prac. & Rem. Code* & *Carr v. Brasher,* 776 S.W. 2d 567, 569 (Tex. 1989).

Public figures were first created by this Court almost 25 years ago in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). And, though the Court has commented on the existence of this category of persons, it has rarely, if ever, said what makes a "public figure".

What we know about public figures from *Gertz* and later cases is that there is a category of persons who are so famous that they are always deemed to be public figures, and are also always subject to the *New York Times* rule. These people are:

> Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures.

Gertz, 418 U.S. at 342.

> . . . [T]hose who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.

Gertz, 418 U.S. at 345. Wally Butts, the athletic director of the University of Georgia in 1962, was apparently such a person. His position alone made him a public figure. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Mary Alice Firestone, a member of one of America's richest families, so well known in the media that she had a personal

press-clipping service, and who called press conferences to discuss her personal life, was not. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

Although WFAA does not appear to claim that McLemore is a public figure for all purposes, it carefully notes every possible indicia of McLemore's notoriety. WFAA calls McLemore a "local celebrity", notes his regular appearance on television, recites the numerous calls made about McLemore's report on the ATF raid, and argues that McLemore sought the limelight in the aftermath of the raid.[1]

None of WFAA's efforts to describe McLemore's notoriety advance the argument that McLemore is a public figure for all purposes. It is not simple notoriety that makes a public figure. The public figure for all purposes is one who has reached a "position of . . . persuasive power and influence"; who has attained notoriety by their achievements or by the vigor and success with which they seek the public's attention.

In fact, this Court has decided that someone much more famous than John McLemore is *not* a public figure based simply on name recognition. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court held that Time magazine was not reporting on a public figure when it reported, falsely, on the divorce of Mary Alice and Russell Firestone –- members of one of America's richest industrial families. Mrs. Firestone was

> prominent among the "400" of Palm Beach society, and an active member of the sporting set, whose activities predictably attracted the attention of a sizable portion of the public. Indeed, Mrs. Firestone's appearances in the press were evidently frequent enough to warrant her subscribing to a press-clipping service.

Id. at 484-484 (Marshall, J., dissenting).

In deciding that Mrs. Firestone was not a public figure this Court focused on two factors. First, Mrs. Firestone's notoriety was limited to her locale [she did not ". . . assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society." *Id.* at

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1. WFAA has previously made consistent citation to matters outside the record to prove McLemore's notoriety. Not only is this improper, WFAA's position must be that McLemore must never speak of this matter again if he is to avoid public figure status.

453]. Second, Mrs. Firestone had not ". . . thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[2] *Id.* Thus, there is something more than mere notoriety or mere appearance in the local public mind that defines a public figure. The degree of fame that is necessary to make one a public figure may be an elusive concept, but McLemore's name recognition and notoriety does not even approach that of Mrs. Firestone. He cannot be a public figure for all purposes.

There are, though, other types of public figures. A class of limited purpose public figures exist among those persons who have ". . . thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. It is this class of persons into which WFAA hopes to fit McLemore. It is this class into which the Texas Supreme Court wedged McLemore. But it is this class that, by its very description, must properly exclude McLemore. The question presented, then, is what this Court meant when it said that persons might lose a substantial interest in their reputation by thrusting themselves to the forefront of public controversy.

A Public Figure seeks to influence public opinion, or the outcome of a public controversy.

When this Court first talked about a public figure that has thrust himself to the forefront of a public controversy, it specifically said that the person's reason for entering the controversy was a key to the inquiry. The public figure enters the controversy ". . . in order to influence the resolution of the issues involved".

Public figure status is grounded on the idea that a speaker has, by his speech or conduct, voluntarily placed his reputation on the line. WFAA attempts to prove that McLemore thrust himself into the controversy by giving examples that imply that McLemore was intentionally (or voluntarily) on the premises of the Davidian compound. Those examples, though, miss the mark because WFAA cannot show that either McLemore's words, or his conduct, had anything to do with the resolution of any public controversy.

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2. It is important to note that the Court would have required that Mrs. Firestone not only "thrust herself" into a public controversy, but also that the purpose of her involvement in the controversy be to "influence the resolution of the issues involved."

Voluntary activity, as part of thrusting oneself into the controversy, is only part of the equation. The voluntary activity must have, as its goal or purpose, some influence on the resolution of the issues. McLemore's reporting has nothing to do with resolving any controversial public issue. McLemore is a fact gatherer. The fact that he chose to be closer to the action, or to undertake personal risk, or that anyone is pleased with his performance has nothing to do with resolving a controversial public issue. Instead, McLemore's function (both from his employer's standpoint, and from his own conduct) was to be present, to observe, and to recollect his observations to others. Unlike an author who "publishes his views," McLemore's presence and observation is not a personal point of view, nor is it a personal opinion. He has not invited public criticism and comment and rebuttal by stating what he saw.

Not every voluntary act that exposes one to publicity results in a determination that one is a public figure. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), provides a compelling example —

In a 1974 Reader's Digest article, Ilya Wolston was named as a "Soviet Agent in the U.S." He was not a Soviet spy, although he had been involved in a 1958 grand jury investigation into the activities of Soviet spies in the United States. As a result of the grand jury investigation, Wolston's aunt and uncle were arrested and pled guilty to espionage charges. Wolston himself was interviewed by the FBI, and testified before this grand jury. However, in July of 1958, Wolston failed to respond to a grand jury subpoena. A Federal judge issued an order for Wolston to show cause why he should not be held in contempt of court.

The potential contempt charges immediately attracted the interest of the news media, and for several days, Wolston was the subject of various news stories focusing on his failure to respond to the grand jury subpoena. Wolston eventually pled guilty to the contempt charge, and received a one-year suspended sentence. These court proceedings also received intensive news coverage. After his sentencing in 1958, the publicity subsided — at least until the Reader's Digest article was published.

Although Reader's Digest claimed that Wolston was a public figure because of the earlier publicity, this Court rejected the argument. In doing so, the Court said:

> We explained in *Gertz* that the rationale for extending the *New York Times* rule to public figures was twofold. First, we recognized that public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective "self-help." . . . Second, and more importantly, was a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."

Id. at 164.

Obviously, Wolston was not deemed one of that ". . . small group of individuals who are public figures for all purposes." So, Reader's Digest claimed that Wolston had thrust himself into the forefront of particular public controversies in order to influence the resolution of the issues involved. According to Reader's Digest, the failure to appear before the grand jury and its attendant publicity "invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage." *Id.* at 165. The Court held, however, that:

> the undisputed facts do not justify the conclusion . . . that [Wolston] "voluntarily thrust" or "injected" himself into the forefront of the public controversy surrounding the investigation of Soviet espionage. It would be more accurate to say that [Wolston] was dragged unwillingly into the controversy.

Id. at 166. Even though Wolston made a conscious decision not to appear before the grand jury, and even though he knew that his decision might be attended by publicity does not mean that he is a public figure. There is no doubt that Wolston's failure to appear was newsworthy, but that fact is also not determinative. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 167.

Elmer Gertz was put through a similar ordeal. Elmer Gertz was a lawyer hired to represent the family of a victim of a police shooting. He attended hearings and other public events on behalf of the family to perform his role as a lawyer. The news media, though, reported on Gertz as the story of interest. They asserted that he was a "Communist fronter", implied that he had a criminal record, and stated that his participation

was part of a "frame-up". And, although Elmer Gertz had ". . . long been active in community and professional affairs", and although he was ". . . well known in some circles," he was plainly not a public figure. *Gertz*, 418 U.S. at 351-352.[3]

In short, Ilya Wolston was exactly like Elmer Gertz. Both men were the subject of some publicity, but not of their own making. Neither sought the publicity, except to the extent that some publicity was inevitable — given the circumstances. Most importantly, neither was seeking to influence the resolution of any public controversy. Like Elmer Gertz and like Ilya Wolston, McLemore might well have known that his rendering aid to the injured ATF agents might be accompanied by publicity (assuming that McLemore took any time at all to give reasoned consideration to the effect of his action, and that he purposely decided to be the one who would receive the publicity). This "decision" to render aid, even if it was accompanied by publicity, did nothing that would have put McLemore's ethics on the table for public discussion. McLemore's only voluntary action is completely unrelated to the stories that WFAA later published about him.

Other courts, even some that were cited by the Texas Supreme Court recognize the importance of a person's purpose in entering into a public controversy. A person who is not attempting to influence public opinion is simply not transformed into a public figure just because he is related to an issue that is interesting. He may become a public figure when he attempts to influence the public, but not before then.[4] And, In *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990), the Court placed great weight on whether a libel plaintiff has entered the controversy by "trying to influence its outcome". *Id.* at 32. The Court said that merely answering the libelous statements does not make one a public figure, nor does the mere act of answering questions

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3. Gertz's role as a lawyer did not mean that he thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. *Gertz* at 418 U.S. 352.

4. By citing *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 136-137 (2nd Cir. 1984), and *Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666 (4th Cir. 1982), the Texas Supreme Court acknowledged that a public figure must ***invite*** public attention, and must invite the attention ***for the purpose of influencing others***, and must invite the attention to influence others ***prior to the event*** that is the subject of litigation. Without explanation, the Texas Court ignored this factor in analyzing McLemore's status.

before the libel occurs make one a public figure. As the Court put it, ". . . it is not clear why someone dragged into a controversy should be able to speak publicly only at the expense of foregoing a private person's protection from defamation." *Id.*

In short, a public figure must not only act voluntarily when he enters into a public controversy, he must intend to influence its outcome. McLemore may have entered into the Branch Davidian raid voluntarily, but nothing he said, and nothing that he did had anything to do with the public issues surrounding the raid. So, he has not thrust himself into the forefront of a public controversy, and he is not a public figure.

A Public Figure must have an ability to respond to the defamatory statements.

In *Gertz*, this Court said that the first remedy of the defamation victim is self-help.

> Public . . . figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

Id. at 344. Therefore, a public figure is less vulnerable to injury from the published falsehood and less deserving of protection in the courts. *Id.* at 345.

It is important to remember that the rule in *New York Times* involved public officials, not public figures. When this Court created a privilege for reporting on public officials, it relied upon three grounds. First, our system of Government presumes a right of the people to criticize the Government, and its officials. Second, the Government officials who are subject to criticism are not commonly liable for their own statements. There is justice and symmetry in saying what is good for the goose is good for the gander. Third, because they are Government officials, they have the ability to answer criticism with speech, propaganda and debate that will result in a better Government.

When this Court was asked to consider whether the *New York Times* rule should be extended beyond Government officials, it could not rely on the same three grounds. Criticism of private individuals, no matter the degree of the individual's celebrity, is not a basic premise of our form of Government. Nor do private individuals have any historical immunity for their own statements.

Instead, the extension of the *New York Times* rule to statements about *some* private individuals was supported by other reasons. First, this Court felt compelled to give consideration to the importance of the defendant's activities. Second, the degree to which the plaintiff has a legitimate call upon the court for protection in light of his prior activities and means of self-defense was deemed relevant. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967). In *Butts*, ". . . the public interest in the circulation of the materials . . . involved, and the publisher's interest in circulating them . . ." was substantial. *Id.* at 155.[5] Without much discussion at all about what makes a public figure, the United States Supreme Court held that Wally Butts should be subject to the actual malice rule ". . . by his position alone", and that Edwin Walker was subject to the rule because of his ". . . purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* The bottom line for both Wally Butts and Edwin Walker was that each had "sufficient continuing public interest and had sufficient access to the means of counter-argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.*

Butts was the first case to decide that public figures were subject to the actual malice rule, but that case did little to really define what a public figure is. However, *Butts* teaches that two relevant factors are —

1) the public interest in circulation of the offending statement

2) the target's ability to respond to the falsehoods

McLemore fits none of the reasoning that would compel the application of the actual malice rule to his situation. McLemore was, admittedly, present at the raid. Because of his presence, one could conclude that the public and the publisher would have a substantial interest in reporting what happened. And, because McLemore's actions were admirable — in that he came to the aid of the injured ATF Agents — the

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5. The *Butts* opinion involved two cases. In one (Butts), the plaintiff was the athletic director for the University of Georgia, and the report made was that he had given away all the football plays to the University of Alabama — thus "throwing the game" to a degree unknown since the "Black Sox" World Series scandal. In the other case (Walker), a civil rights leader who had a long and honorable Army career and a following that was called the "Friends of Walker" was said to have led a riot at the University of Mississippi during the time that James Meredith was attempting to attend classes.

public and the publishers naturally called upon him to comment on both the events, and on his reaction to the events.

That fortuitous participation in the raid does not strip McLemore of his rights to his own good name for all purposes. WFAA argues that because McLemore came to the aid of the wounded, he opened his own life for the examination and criticism that might later come his way. That is a bad rule. The law should not discourage McLemore's actions by transforming him into a person who has been deprived of both his privacy and his reputation.

The Texas Supreme Court held that McLemore's decision to answer questions about the ATF raid makes him a public figure because he ". . . engaged in activities that necessarily involved increased public exposure and media scrutiny . . ." The result of that rule is that every person who answers a question posed by the media is a public figure — risking his or her reputation simply by the fact that a question was answered. That rule will not withstand any Constitutional analysis. No Court has held that a mere comment to the media opens one's reputation to investigation and comment. In fact, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) holds exactly the opposite. The type of activity that risks reputational injury is activity that invites belief or disbelief in the speaker's statement — that invites agreement or disagreement. McLemore's statements are not even close to the type of statement that invites agreement or disagreement on the issue in question. Even under the Texas Supreme Court's definition of the public controversy in question — why the ATF agents failed to accomplish their mission — McLemore's statements address no part of the issue. He commented only on what happened to him — not why it happened, or whether it should have happened. To decide that any and every comment by McLemore put his reputation at risk is a rule that no American would believe applied to them. No reasonable person would believe that answering questions by the media would mean that the media had a free rein to investigate their personal life or to report on their personal life, or to make false statements about them.

And besides, the reports at issue here have nothing to do with McLemore's rescue of the ATF Agents — the thing for which he became noteworthy. Instead, they are reports that question McLemore's job performance and integrity. As to the integrity and honesty of McLemore, the public has no real reason to hear rumors circulated. The publisher

has no real reason to publish rumor. As to the integrity of a journalist, any other professional, or any individual, the role of the press is not to find the polluted information, but to find the true facts. Rumor is, at this point, "at odds with the premises of democratic government."

And though McLemore had access to the media to explain what he saw during the raid, and how he responded, he did not have that type of access to answer the rumors that he was the tipster to the Davidians. Everyone wanted to hear what John McLemore had to say about what he saw, and what he did during the gunfight at the Davidian compound. The discussion about McLemore's ethics and his possible participation in obstructing justice essentially went on without him. Unlike public officials who have a continuing access to the media, and whose job it is to debate and discuss public policy, and unlike Wally Butts and Edwin Walker, who had their own ability to respond to the fallacies of their critics, McLemore is a mere underling at his TV Station. He does not determine content; he does not have the ability to take over his "air-time" for personal response time; he has no public following devoted to the advancement of his career or his cause.

Just as importantly, McLemore's access to the media was expressly limited — unlike a true "limited purpose" public figure.[6] The record reflects that McLemore's boss at the television station told him not to comment on the WFAA reports. Admittedly, McLemore commented on the raid on live television, but these comments were *prior* to the report of WFAA. There is no incident in the record where McLemore was given a chance, or had the ability, to rebut the WFAA reports.[7] He

6. The Texas Court acknowledged the importance of this factor when it cites *Clark v. American Broad. Co., Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982) [the extent to which there is access to channels of effective communication in order to counteract false statements], but declined to analyze this factor as it applies to McLemore. Here, whatever access McLemore had to the media, there is a substantial question as to whether that access is effective to counteract false statements.

7. The Texas Supreme Court apparently believed that McLemore's post-raid comments were incited by his own desire to brag on himself. Any such contention is patently absurd, and is unsupported by the record. First, McLemore was deluged with requests for information. That he would respond to these requests at all reflects only his desire to be a journalist and to report what he saw. Second, criticism, in any form, of McLemore for the words that he chose moments after the event is extraordinarily unrealistic. McLemore had just been in the middle of (Cont'd)

did not, and does not have the type of access to the media that is required of public figures.

Moreover, it does not matter that McLemore had airtime and media access before he was accused by WFAA. That airtime was not to voice his opinions, or to influence the public. It was, like all the rest of his job, to describe what he saw, and to tell what he had learned. Therefore, McLemore is not in a class of persons to whom the actual malice standard ought to apply because that class has protection and defenses that are not available to McLemore.

Public figures are not classified by their job duties or by their societal status.

No case relating to public figures has ever held that certain jobs or that certain societal status automatically makes one a public figure. And this is correct. This Court has had the opportunity to hold that lawyers, prominent members of society, and criminal defendants are all persons undeserving of protection insofar as their reputations are concerned. But, the Court has never said that any status is undeserving of protection. In fact, the only statement made that is categorically applicable is that all persons are entitled to the protection of their own good name. An individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75 (1966) Stewart, J. Even public officials have some protection from deliberate falsehood. [". . . the use of the known lie is at odds with the premises of democratic government . . ." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)] Yet WFAA seeks a type of rule that makes journalists the only category of profession that is "free game" in the law of defamation.

McLemore had one role at the Branch Davidian compound, but he was subjected to publicity for two very different reasons. He was initially sent to report. Report means to observe and recollect events and impressions. He had cameramen available to assist him in this role. When the raid began, and when it turned into an ambush, McLemore had a choice — sit back and continue to report, but not become involved; or

(Cont'd)
a gunfight. He had assisted in the removal of severely wounded law enforcement officials. To parse his words at that time, and to conclude from his words that he has voluntarily undertaken a risk (to his reputation) that would bear on his life for years in the future is ill-considered, at best.

come to the aid of injured people. He chose to come to the aid of the wounded. By doing so, WFAA apparently claims that McLemore has "assumed an influential role in ordering society," and has relinquished part of his interest in the protection of his own good name. *See Gertz*, 418 U.S. at 346. Certainly, McLemore's action in aiding the wounded ATF agents was of interest. But, there is no controversy included within it. By giving aid, McLemore did not become a participant in the issue of the propriety of the raid, the methodology of the raid, the Government policy that led to the raid, or the Government decisions that related to the raid. At the point that McLemore rendered aid to the wounded, he did not "assume a role of especial prominence in the affairs of society". Moreover, even if McLemore's action (rendering aid) was a voluntary act, it was not an act that thrust him into the forefront of a public controversy "in order to influence the resolution of the issues involved in it."

The Texas Supreme Court held that McLemore is a public figure because he was "on the scene in his role as a journalist". In short, because McLemore was doing his job as a reporter, he is a public figure. The result of that rule is to determine that every journalist is a "limited purpose" public figure for every story that they write or tell. Again, that rule cannot stand Constitutional analysis. A reporter may well attempt to influence public opinion by his work, but unless he does, he is not engaged in the type of activity that invites comment on his reputation. The Texas Court cited *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), and says that *Waldbaum* holds that a person's talents, education, experience and motives *were* relevant to the public's decision to listen to him. That is not an accurate quotation. *Waldbaum* actually holds that such matters *could* be relevant to public figure status, but leaves the matter for determination among other factors. That distinction was important in *Waldbaum* because the Plaintiff in that case was an executive at the country's second largest consumer cooperative, was a "mover and shaper" of policies relating to supermarket standard, and was well known for his controversial views on specific issues. In *Waldbaum*, the Plaintiff's prior history in expressing his views is entirely relevant to public figure status, and his talent, education, motives and experience may well bear on his public figure status. That is not true as to all citizens. And especially as to those who have never before expressed their views on a situation.

McLemore fits this mold. As a reporter, he is merely making statements about events that are of public interest. The mere fact that his job was to report truthfully on events, and that his reporting became widely known does not cost him protection from defamation.

Public figures are not created by the media or by events surrounding them.

No defamation case has ever held that the media may create a public figure by reporting on him. The person must be a public figure before he is reported upon — not because he is a victim. So, WFAA should not be permitted to transform John McLemore into a public figure by asking him questions — which he answered, and then leaving that scene to investigate his ethics, his professional or private life. If this is not so, then the media can make anyone a public figure, and thereby reduce their obligation to know the truth, simply by pushing a microphone into a person's face.

Matters of public concern seem to be a very prominent issue for WFAA. Most media outlets have continuously argued for a privilege to report on matters of public concern. The request for this type of universal privilege has been squarely rejected, primarily because the courts should not be saddled with the obligation to decide what is, and is not, of public concern. *Gertz*, 418 U.S. at 346. So, any argument that an issue of public concern has great bearing on the status of an individual as a public figure is given far more importance than it deserves. Just because a report involves a subject interesting to the public does not make every individual in the report a public figure.

Naturally, it behooves the media to claim that matters of public concern create public figures. That gives the media the power to transform a person into a public figure by the media's own reporting on that individual's activity. (You are a public figure because we made you one). And, it permits the media to create a public figure, and by doing so, to reduce their burden to report accurately. It is for these reasons that the United States Supreme Court has consistently held that the

> . . . fact that expression concerned a public issue [does] not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections . . . were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability."

Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985). Just because the topic is interesting does not give the media a license to defame.

Moreover, WFAA seeks to describe the public controversy in this case in a very biased fashion. WFAA is certainly entitled to question and investigate almost anything that involves the Government and its role in the Branch Davidian episode. *New York Times* says that this critical examination of Government is at the heart of the First Amendment. But, WFAA cannot, under the guise of investigating Government activity or policy, drag private individuals into its reports unless it is willing to forego the actual malice standard.

The alleged rights of the media to report on events of public importance have justifiably confused courts. For example, in *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 433 (5th Cir. 1987), the Fifth Circuit gave great weight to the nature of the controversy, and the public's interest in it. According to that court, the interest of the public in certain events can cause a private individual to forfeit his own rights in his reputation. In *Trotter*, the Fifth Circuit deemed significant that the ". . . the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution."

But this Court has made clear that it is the role of the injured party in the controversy that is important, not the public perception of the event. A person who is not attempting to influence public opinion is simply not transformed into a public figure just because he is related to an issue that is interesting. He may become a public figure when he attempts to influence the public, but not before then.

Mrs. Firestone held press conferences about her trial, yet she was not a public figure. Elmer Gertz appeared in public numerous times for the purpose of performing his job, yet he was not a public figure. John McLemore is no different.

Question No. 2:

In a defamation case, a person may become a public figure involuntarily. What must occur for one to become a involuntary public figure?

"Hypothetically, it may be possible for someone to become a public figure through no purposeful act of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Gertz*, 418 U.S. at

345. Counsel has been unable to locate any other case where this Court has said anything further about what might make an involuntary public figure. Nor has counsel been able to locate a lower court case that has purported to rely on the involuntary public figure theory to decide a case. But, some things can be said about this rare type of public figure.

Certainly, no person can become an involuntary public figure because of the words he has spoken. Words, ideas and opinions are not involuntary things. If the Court is to hold that there are circumstances in which a person becomes a public figure involuntarily, it cannot come to pass because of substance of the words spoken. Instead, it has to be conduct that communicates the idea, or the opinion.

But the conduct that makes a person an involuntary public figure must be universally understood to communicate an idea or opinion. And, the conduct, if not the words, must also influence the outcome of the event of public interest. An involuntary public figure should be understood by the audience as seeking to influence the outcome of a public controversy whether he intended to have that influence or not. The interpretation of the audience should be universally understood and universally accepted. A single interpretation that is not reasonable should be insufficient to make an involuntary public figure.

However, McLemore cannot be charged with communication through a verbal act when he appeared on the scene at the ATF raid, nor when he acted to desist injured people. This conduct communicates nothing about the resolution of the public issues. No member of the audience would have understood McLemore's conduct to communicate a position for or against the government's activity, or to favor or disfavor the Branch Davidians' conduct. Even in a class of involuntary public figures, mere involvement, without more, is not enough to open one's life to public scrutiny.

WFAA may argue that every journalist commits a verbal act when he makes a report. It could be argued that every reporter asserts — non-verbally — that the reporter's story is true and that the reporter did not create the event for some non-professional motive. That argument, though, does not justify the protection of *New York Times*. Instead, before one argues that the reporter is a liar, or that the reporter has concocted the event for ratings, or his own personal glory, one ought to have something more than the absence of actual malice. The report should be non-

negligent. To hold otherwise would make every journalist an involuntary public figure.

Some have suggested that an involuntary public figure might be one who is so closely aligned with government activity that it is impossible to separate him from the public activity that is a fair subject for comment. Tribe, *American Constitutional Law 2d* (1988) § 12-13, p. 880. When the story of government activity cannot be told without mentioning an otherwise private individual, then that private individual could become a public figure involuntarily. Mere involvement in uniquely governmental functions, like court proceedings, is insufficient to elevate a private citizen to public figure status. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). McLemore was merely present at, and reporting on governmental activity. The story of the Davidian raid and the government's relation to it can be retold, effectively, without comment on McLemore. So, the category of involuntary public figures should remain rare — still so rare that it does not include McLemore.

REASONS FOR GRANTING THE WRIT

I.

THE LAW OF PUBLIC FIGURES IS NOT SETTLED, AND LOWER COURTS IN THE STATE AND FEDERAL SYSTEMS NEED GUIDANCE.

While the Court has said who is a public figure (Wally Butts and Edwin Walker) and who is not a public figure (Elmer Gertz, Mary Alice Firestone and Ilya Wolston), it has never said specifically what makes a person a public figure. There are some factors mentioned in the few cases decided by this Court, but the cases decided to date lack instruction on the weight to be given to the various factors. Lower courts have attempted to fashion "tests", but without some teaching on the weight to be given to various factors, the lower courts will simply decide cases on an *ad hoc* basis. In essence, the lower courts will

> . . . scrutinize every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interests in protecting the particular plaintiff who prevailed.

Gertz, 418 U.S. at 343 [a system rejected by the majority].

Defining a public figure is an important task. The definition includes a balancing of freedom of speech and the important property rights in

one's own good name. Further experimentation and guesses from the lower courts as to the proper means to define this state is unproductive. The *ad hoc* system that prevails today ought to be replaced with rules of general application, as the Court apparently intended in *Gertz*.

II.

MEDIA REPORTING HAS CHANGED SUBSTANTIALLY SINCE THE LAST PUBLIC FIGURE CASES.

When this Court considered *Gertz*, *Firestone* and *Wolston*, media reporting was a much more considered and deliberate process. The Court rightfully believed that editors carefully considered the content of their coverage before publication, and presumed that editors might engage in self-censorship if they had to weigh the cost of a lawsuit against their own report. Today, though, the costs and burdens of litigation are hardly a concern deserving constitutional protection. *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

Little of that deliberate process exists in today's media. News is broadcast 24 hours a day, and much of it is instantaneous. It is a fiction to think that editors are engaged in the process of balancing the reputation of the innocent against the media's decision to publish when much of their reporting is in "real time". Instead, one could easily conclude that editors believe that *New York Times* gives them so much power that they are virtually invincible. The right to a good name suffers from this process even though the right to a good name is supposed to be a concept at the root of any decent system of ordered liberty. This is not good policy. Under the existing law, it is presumed that the editor has notice of the fact that his "news" may ruin the reputation of the person that is the subject of his report. That much will always be true. What is not true today is that editors always make a conscious decision that their report is "true enough" before they publish. The actual decision of editors to publish has little to do with truth any longer.

III.

PEOPLE DESERVE MORE PROTECTION OF THEIR REPUTATION THAT IS BEING GIVEN BY THE MEDIA TODAY.

Since 1964, the courts have accorded the media special treatment because of the United States Supreme Court decision in *New York Times*

v. Sullivan, 376 U.S. 254 (1964). The classic quotations from that case include —

> debate on public issues should be uninhibited, robust and wide-open, and it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 270.

> erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive."

Id. at 272.

However, few recall that the point of the *New York Times* case was to grant "breathing space" for criticism of the government generally, or of government officials, in particular. It is not surprising that our Constitution would grant "breathing space" to any statement that criticizes the Government. Criticizing the Government is one of the reasons that we have freedom of speech in America.

Persons who are subjected to criticism but who are not part of the Government are different. While we are inclined to give the press some "breathing space", this Court has recognized that the *New York Times* rule countenances two evils in cases that do not involve the government:

> [F]irst, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 769 (1985) (White, J., concurring). The First Amendment might be an important part of our freedoms, but it is not the only fundamental right at issue in a libel case:

> The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that

> the right is entitled to any less recognition by this Court as a basic of our constitutional system."

Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974), citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). It is wrong, then, to buy into the proposition that the media is always entitled to deference and always entitled to make errors.

One has to ask whether an individual has any real ability to avoid media coverage when the media has decided to target him. While the law contemplates a conscious decision by an individual to involve himself in public issues, the reality of that choice is illusory in today's context. No individual has a real ability to avoid the media. And, since the media has the power to make anyone a "household name" within the passage of mere hours, it is hard to conceive of a person who is not publicly known by the time that he would be able to sue for defamation. If we are to allow the press the benefit of the *New York Times* rule, do we also allow the press to "create" public figures that become subject to that rule? In this case, WFAA has done exactly that. McLemore gained notoriety because he was on the scene of an interesting and compelling event. WFAA now claims that because he was there, they have a license to publish almost anything they want to about him, and to do so with a lesser obligation to investigate and verify what they are reporting. What this Court must decide is whether it is appropriate to allow WFAA to toss McLemore into a stream of polluted information, to destroy his life with the polluted information, and claim an absolute right to do so. If McLemore is a public figure, then that result obtains

The Court needs to draw a line, not to prevent inquiry by the press, but to demand accuracy from the press. Public figure status does not determine who can be investigated, it determines how accurate the report must be before it is published.

IV.

NOTED COMMENTATORS BELIEVE THAT THE COURT HAS NOT GIVEN ADEQUATE DIRECTION ON THE ISSUE OF PUBLIC FIGURES.

Those who study the Court have noted that *Gertz*, *Firestone*, *Wolston* and *Dun & Bradstreet* have done little to define what a public figure is. While the Court has, at one point, said that the lower courts are not supposed to determine the existence or nature of a public controversy, the present standard — "voluntarily injecting himself into the public

controversy" — actually requires a court to decide what is a public controversy. According to Professor Tribe, that standard holds grave danger because it fails to accommodate the two interests that are truly competing. The balance must be drawn in defamation cases is not whether a controversy is public. The balance must be drawn between freedom of the press, and the protection of reputation. But, the current standards of fault (either "actual malice" or "negligence") do nothing to assist the balancing process. Tribe, *American Constitutional Law 2d* (1988) § 12-13, p. 883. The balance between these critical interests is important to both sides of this case, and has remained undecided for many years. It is appropriate, now, for the Court to give instruction on this issue.

CONCLUSION

For the reasons stated above, this Court should grant this Petition for Certiorari, and should reverse the Judgment of the Texas Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF TEXAS DATED SEPTEMBER 24, 1998

IN THE SUPREME COURT OF TEXAS

No. 97-0868

WFAA-TV, INC., PETITIONER

v.

JOHN MCLEMORE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

Argued on April 1, 1998

JUSTICE HANKINSON delivered the opinion for a unanimous Court.

In this defamation suit arising out of the 1993 Bureau of Alcohol, Tobacco and Firearms (ATF) raid on the Branch Davidian compound at Mount Carmel, we decide whether a media plaintiff, one of only a few journalists to report live from the scene of the raid, whose reports were rebroadcast worldwide, and who willingly gave numerous interviews about his role in the failed raid, is a public figure. The plaintiff sued WFAA-TV Channel 8 in Dallas alleging that its news reports concerning his role in the failed raid damaged his reputation in the community. The trial court denied WFAA's motion for summary judgment, and the court of appeals affirmed. __ S.W.2d __. Because we conclude that the plaintiff in this case became a limited-purpose public figure after thrusting himself to the forefront of the controversy surrounding the failed ATF

assault, we reverse the court of appeals' judgment and render judgment that the plaintiff take nothing.

On February 28, 1993, ATF agents approached the Mount Carmel compound occupied by the Branch Davidians, a small religious sect that had amassed an arsenal of illegal weaponry. Two local media outlets, KWTX-TV Channel 10 in Waco and the *Waco Tribune-Herald*, learned from various sources that a major law enforcement operation would proceed at Mount Carmel that morning. KWTX-TV dispatched reporter John McLemore and cameraman Dan Mullony to report on the event.

When the ATF agents attempted to enter one of the buildings on the compound, they became involved in a gunfight with the Davidians. During the battle, four ATF agents and three Davidians were killed, and twenty ATF agents were wounded. McLemore and Mullony, the only media representatives to follow the agents onto the compound, reported live from the midst of the firefight.

Two days after the gunfight, media reports began to focus on why the ATF raid had failed and what sparked the gunfight. On March 2, 1998, Kathy Fair, a *Houston Chronicle* reporter, appeared on *Nightline*, an ABC news show anchored by Ted Koppel. During the show, Koppel and Fair discussed the media's role in the botched ATF raid. Koppel asked what went wrong with the media's coverage, and Fair initially responded that it was too early to determine. She then suggested ATF agents believed they were set up:

> I think many officers will tell you that they blame the media, particularly the local media, for the tragedy that occurred here. They think the fact that

> both the newspaper and the local television station, who were already at the compound, some of whom were reporters for, I believe, the TV station, allegedly were already hiding in the trees when federal agents arrived. And that was the first indication that many of them had that they had been set up, and that's a strong belief I think they have that they have not shared publicly yet, is that they think they were set up.

As soon as the *Nightline* broadcast ended, KWTX-TV began to receive calls critical of McLemore's role in the raid, even though Fair had not identified him by name.

WFAA picked up the story the next day and began to broadcast reports by Valerie Williams, a WFAA reporter, who repeated Fair's report that ATF agents saw local media hiding in trees at the compound before the attack began. WFAA then broadcast video footage of McLemore while apparently on the compound grounds. Williams then continued her report:

> The only reporters at the scene Sunday morning were Steve [sic] McLemore and a television photographer from KWTX-TV in Waco and one or two reporters from the local newspaper. McLemore's news unit was used to transport some of the wounded agents. Currently his bosses are consulting with attorneys before issuing a statement.

Later that evening, WFAA broadcast a similar piece, again repeating excerpts from *Nightline*, followed by commentary from Williams:

> [T]he only reporters at the scene Sunday morning were John McLemore and a photographer. . . . Wednesday night McLemore's station . . . demanded a retraction from *Nightline* saying, "[T]he rumor that a Waco reporter had tipped the cult about the raid in exchange for permission to be on the compound grounds was completely false. No reporter or photographer from local media was on the compound grounds prior to the raid."

Soon after the reports aired, McLemore sued WFAA-TV, Valerie Williams, A.H. Belo Corporation, Belo Productions, Inc., the *Houston Chronicle*, and Kathy Fair for defamation, alleging that their news reports of his role in the failed raid damaged his reputation in the community. WFAA moved for summary judgment on six grounds: (1) no defamatory meaning; (2) fair report privilege; (3) fair comment privilege; (4) truth; (5) no actual malice; and (6) neutral reporting privilege. After McLemore nonsuited Williams and the two Belo corporations, the trial court granted summary judgment in favor of the *Chronicle* and Fair, but denied WFAA's motion for summary judgment.

Affirming the trial court's judgment, the court of appeals concluded that McLemore was a private individual, and as such, he had to prove negligence, not actual malice, in his defamation case. Because WFAA did not move for summary judgment on the grounds that it acted without negligence, the court of appeals determined that the issue was not before it and remanded the defamation action to the trial court for further proceedings consistent with its opinion. __ S.W.2d at __.

WFAA now appeals under section 22.225(d) of the Texas Government Code, which provides this Court with jurisdiction

to hear a petition for review from an interlocutory order denying a media party's motion for summary judgment in a defamation case. TEX. GOV'T CODE § 22.225(d); TEX. CIV. PRAC. & REM. CODE § 51.014(6). Specifically, WFAA argues that summary judgment is proper because McLemore is a public figure, and as a matter of law, it did not broadcast its reports with actual malice.

To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989)(citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). To have prevailed on its motion for summary judgment, WFAA must have disproved at least one essential element of McLemore's defamation claim. *See Doe v. Boys Clubs of Greater Dallas*, 907 S.W.2d 472, 476-77 (Tex. 1995).

Fault is a constitutional prerequisite for defamation liability. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). Private plaintiffs must prove that the defendant was at least negligent. *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976) (holding that "a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false"); *see also Gertz*, 418 U.S. at 347 (holding that states may define for themselves the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual "so

long as they do not impose liability without fault"). Public officials and public figures must establish a higher degree of fault. They must prove that the defendant published a defamatory falsehood with actual malice, that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80 (defining the actual malice standard and applying it to public officials); *see also Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (applying the *New York Times* actual malice standard to public figures).

Because a defamation plaintiff's status dictates the degree of fault he or she must prove to render the defendant liable, the principal issue in this case is whether McLemore is a public figure. The question of public-figure status is one of constitutional law for courts to decide. *See Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987). Public figures fall into two categories: (1) all-purpose, or general-purpose, public figures, and (2) limited-purpose public figures. General-purpose public figures are those individuals who have achieved such pervasive fame or notoriety that they become public figures for all purposes and in all contexts. *See Gertz*, 418 U.S. at 351. Limited-purpose public figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy. *See id.*

To determine whether an individual is a limited-purpose public figure, the Fifth Circuit has adopted a three-part test:

> (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the

> controversy are likely to feel the impact of its resolution;
>
> (2) the plaintiff must have more than a trivial or tangential role in the controversy; and
>
> (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Trotter, 818 F.2d at 433 (citing *Tavoulareas v. Piro*, 817 F.2d 762, 772-73 (D.C. Cir. 1987) (en banc)); *see also Waldbaum v. Fairchild Pub., Inc.* 627 F.2d 1287, 1296-98 (D.C. Cir. 1980). Although the *Trotter/Waldbaum* test does not distinguish between plaintiffs who have voluntarily injected themselves into a controversy and those who are involuntarily drawn into a controversy, some courts have held that plaintiffs who are drawn into a controversy cannot be categorized as limited-purpose public figures.[1] Because, as we explain below,

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1. *See, e.g., Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 136-37 (2nd Cir. 1984) (adopting four-part limited public-figure test, requiring defendant to prove plaintiff: (1) "successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media"); *Fitzgerald v. Penthouse Intern'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982) (adopting five-part limited public figure test, requiring defendant to prove: "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time

(Cont'd)

McLemore clearly voluntarily injected himself into the controversy at issue, we need not decide in this case whether "voluntariness" is a requirement under the limited-purpose public-figure test we apply. Nevertheless, the *Trotter/Waldbaum* elements provide a "generally accepted test" to determine limited-purpose public-figure status. *See, e.g., Little v. Breland*, 93 F.3d 755, 757 (11th Cir. 1996); *Harris v. Quadracci*, 48 F.3d 247, 251 (7th Cir. 1995); *Silvester v. American Broad. Co.*, 839 F.2d 1491, 1494 (11th Cir. 1988); *Faigin v. Kelly*, 978 F. Supp. 420, 427 (D.N.H. 1997); *Russo v. Conde Nast Pub.*, 806 F. Supp. 603, 609 (E.D. La. 1992); *Brueggemeyer v. American Broad. Co.*, 684 F. Supp. 452, 455, 457-58 (N.D. Tex. 1988).

Applying the *Trotter/Waldbaum* limited-purpose public-figure elements to this case, we must first determine the controversy at issue. *Trotter*, 818 F.2d at 433-34; *Waldbaum*, 627 F.2d at 1296. In *Waldbaum*, the D.C. Circuit elaborated on how to determine the existence and scope of a public controversy:

> To determine whether a controversy indeed existed and, if so, to define its contours, the judge must

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(Cont'd)
of the alleged defamation"); *Clark v. American Broad Co., Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982) (considering three elements to determine if plaintiff is limited public figure: "first, the extent to which participation in the controversy is voluntary; second, the extent to which there is access to channels of effective communication in order to counteract false statements; and third, the prominence of the role played in the public controversy"); *But cf. Gertz*, 418 U.S. at 351 ("More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.").

> examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.

627 F.2d at 1297. In this case, numerous commentators, analysts, journalists, and public officials were discussing the raid and the reasons why the ATF raid failed. As evidenced by Fair's comments during the *Nightline* broadcast, as well as reports by *The Dallas Morning News* and the *Fort Worth Star Telegram,* the press was actively covering the debate over why the ATF raid failed. Many such discussions focused on the role of the local media in the ATF's failure to capture the Davidian compound. The controversy surrounding the Branch Davidian raid was public, both in the sense that people were discussing it and people other than the immediate participants in the controversy were likely to feel the impact of its resolution. *See Trotter*, 818 F.2d at 433; *Waldbaum*, 627 F.2d at 1297; *see also Einhorn v. LaChance*, 823 S.W.2d 405, 413 (Tex. App. — Houston [1st Dist.] 1992, writ dism'd w.o.j.). While the court of appeals defined the controversy as limited to "McLemore's personal ethical standards as a journalist," we do not view it so narrowly. Based on the facts outlined above, we conclude that the public controversy at issue is the broader question of why the ATF agents failed to accomplish their mission.

To determine that an individual is a public figure for purposes of the public controversy at issue, the second *Trotter/ Waldbaum* element requires the plaintiff to have had more than a trivial or tangential role in the controversy. *Trotter*, 818 F.2d at 433; *Waldbaum*, 627 F.2d at 1297. In considering a libel

plaintiff's role in a public controversy, several inquiries are relevant and instructive: (1) whether the plaintiff actually sought publicity surrounding the controversy, *Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1254 (5th Cir. 1980); (2) whether the plaintiff had access to the media, *see, e.g.*, *Gertz*, 418 U.S. at 344; *Curtis*, 388 U.S. at 155; and (3) whether the plaintiff "voluntarily engag[ed] in activities that necessarily involve[d] the risk of increased exposure and injury to reputation," *see Brewer*, 626 F.2d at 1254; *Waldbaum*, 627 F.2d at 1294-95; *see also Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 939-40 (1st Cir. 1989); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 571 (Ariz. 1986). "By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition in the marketplace." *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996).

The record reflects that McLemore acted voluntarily to invite public attention and scrutiny on several occasions and in several different ways during the course of the public debate on the failed ATF raid. For example, McLemore was the only journalist to go onto the grounds of the compound, while other reporters assigned to cover the raid did not. By reporting live from the heart of the controversial raid, McLemore assumed a risk that his involvement in the event would be subject to public debate. Following the battle, McLemore spoke to other members of the press about the attempted raid, conveying his pride in his coverage from the midst of the gunfight, and portraying himself as a hero in assisting wounded ATF agents when he remarked that his role in the raid was "at considerable personal risk" and in contrast to other journalists who "were pinned down in a ditch" outside the compound. As a journalist, McLemore had ready, continual access to the various media

sources. To one group of reporters, he explained that "as a journalist, I was . . . pleased to see that my coverage of this story was being broadcast to a wide audience." Thus, by choosing to engage in activities that necessarily involved increased public exposure and media scrutiny, McLemore played more than a trivial or tangential role in the controversy and, therefore, bore the risk of injury to his reputation. *See Brewer*, 626 F.2d at 1254.

The third and final element we consider — that the alleged defamation is germane to the plaintiff's participation in the controversy — is also satisfied in this case. *See Trotter*, 818 F.2d at 433; *Waldbaum*, 627 F.2d at 1298. McLemore alleges that WFAA defamed him by displaying footage of his coverage from the scene of the compound during the raid, while reporting that federal officials believed a member of the local media informed the Branch Davidians about the ATF raid. Therefore, the alleged defamation directly relates to McLemore's participation in the controversy. He was on the scene in his role as a journalist, as conveyed by the footage WFAA broadcast, and WFAA's alleged defamatory comments are indeed germane to McLemore's participation in the controversy over the media's role in the failed attack. *See Waldbaum*, 627 F.2d at 1298-1300 (explaining that a public figure's talents, education, experience, and motives were relevant to the public's decision to listen to him). Accordingly, McLemore reached limited-purpose public-figure status through his employment-related activities when he voluntarily injected himself into the Branch Davidian raid.

We now turn to the fault standard McLemore must meet in order to sustain his defamation claim against WFAA. As a public figure, McLemore must prove that WFAA acted with

actual malice in allegedly defaming him. *See Curtis*, 388 U.S. at 162 (Warren, C.J., concurring); *New York Times*, 376 U.S. at 283; *see also Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 510-11 (1984). Actual malice is a term of art, focusing on the defamation defendant's attitude toward the truth of what it reported. *See McCoy v. Hearst Corp.*, 727 P.2d 711, 736 (Cal. 1986). Actual malice is defined as the publication of a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. Reckless disregard is also a term of art. To establish constitutional recklessness, a defamation plaintiff must prove that the publisher "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

A libel defendant is entitled to summary judgment under Texas law if it can negate actual malice as a matter of law. *See Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646-47 (Tex. 1995); *Casso v. Brand*, 776 S.W.2d 551, 555 (Tex. 1989). A libel defendant can negate actual malice by presenting evidence that shows he or she did not publish the alleged defamatory statement with actual knowledge of any falsity or with reckless disregard for the truth. *See Casso*, 776 S.W.2d at 559. To negate actual malice in this case, in her affidavit, WFAA reporter Valerie Williams detailed her belief that all of the reports she made were true and set forth the basis of those reports. Specifically, she swore that "[she] believed [her] reports accurately reflected public allegations by responsible, respected and well-informed journalists and news organizations, regarding a highly newsworthy matter and concerned an official investigation by law enforcement officers of a suspected tip-off of the Branch Davidian cult." She explained in detail the foundation of her belief by providing a chronology of the actions

she took and the materials she reviewed in preparing her report. This testimony as to Williams' beliefs and the basis for them was sufficient for WFAA to meet its burden of negating actual malice. *See Randall's Food Mkts., Inc.*, 891 S.W.2d at 646-47; *Casso*, 776 S.W.2d at 559; *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989). As McLemore presented no proof controverting these specific assertions, WFAA established as a matter of law that it did not act with actual malice in reporting the ATF's investigation into why the Branch Davidian raid failed, and therefore WFAA was entitled to summary judgment on McLemore's defamation claim.

Accordingly, we reverse the court of appeals' judgment and render judgment that McLemore take nothing.

Deborah G. Hankinson
Justice

OPINION DELIVERED: September 24, 1998

APPENDIX B — JUDGMENT OF THE SUPREME COURT OF TEXAS DATED SEPTEMBER 24, 1998

IN THE SUPREME COURT OF TEXAS

No. 97-0868

WFAA-TV, INC., PETITIONER

v.

JOHN MCLEMORE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Tenth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) Judgment is rendered that John McLemore take nothing from WFAA-TV, Inc.;

3) WFAA-TV, Inc. shall recover from John McLemore, who shall pay the costs in this Court and in the court of appeals.

Appendix B

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Tenth District and to the District Court of McLennan County, Texas, for observance.

(Opinion of the Court delivered by Justice Hankinson)

September 24, 1998

APPENDIX C — OPINION OF THE COURT OF APPEALS OF TEXAS, WACO DATED JUNE 25, 1998

WFAA-TV, INC., Appellant,

v.

John McLEMORE, Appellee.

No. 10-96-033-CV

Court of Appeals of Texas,
Waco.

June 25, 1998.

Ordered Published Nov. 12, 1998.

* * *

Before Chief Justice DAVIS, Justice CUMMINGS, and Justice VANCE.

OPINION

REX D. DAVIS, Chief Justice.

This is a defamation suit arising out of the 1993 raid by agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) on the Branch Davidian compound at Mount Carmel outside of Waco. John McLemore, a reporter for KWTX-TV Channel 10 in Waco, sued (1) WFAA-TV Channel 8 in Dallas, (2) Valeri Williams, a WFAA reporter, (3) A.H. Belo Corporation, (4) Belo Productions, Inc., (5) the *Houston Chronicle*, and

(6) Kathy Fair, a *Chronicle* reporter, alleging that their news reports regarding his role in the events surrounding the raid damaged his reputation in the community. After McLemore non-suited Williams and both Belo corporations, the trial court granted summary judgment in favor of the *Chronicle* and Fair but denied WFAA's motion. WFAA appeals claiming that the court erred when it rejected its motion. We will affirm.

BACKGROUND

Facts

On February 28, 1993, ATF agents sought to search the Mount Carmel compound occupied by the Branch Davidians, a small religious group. Through information gained from various sources, two local media outlets, KWTX-TV and the *Waco Tribune-Herald,* suspected that a major law enforcement operation was to occur at Mount Carmel that morning. KWTX dispatched McLemore and Dan Mullony, a cameraman, in one truck and John Peeler, another cameraman, in a second truck to report on the raid. The *Tribune-Herald* sent three vehicles containing seven reporters to Mount Carmel to cover the events.

When the ATF agents attempted to enter the building, they became involved in a gunfight with the Davidians. Four ATF agents and three Davidians were killed, and twenty ATF agents were wounded during the shooting. McLemore and Mullony had followed the ATF agents onto the compound grounds and were the only media representatives actually in the midst of the firefight. Mullony filmed the events and McLemore reported live from the scene of the gun battle.

On March 2, Kathy Fair appeared on Nightline, a late night news show anchored by Ted Koppel and broadcast nationally

by ABC. During the show, Koppel and Fair discussed the media's role in the failure of the ATF raid:

> KOPPEL: It's also fair to say that there are times when law enforcement loves [media attention], loves having those cameras there, loves having reporters along. What happened this time? Were we pushing too hard? Did they want the publicity? Is it too early to tell yet what went wrong?
>
> FAIR: Well, I think it's too early to tell what went wrong inside the compound, and it may be too early to answer the question just what role the media may have played in the tragedy, whether the media bears any responsibility for the deaths of anyone. That's a question that has been asked at every press conference I've attended. It's a question that's been asked at every impromptu gathering between reporters and news sources in there. And the question has always been answered the same officially, and that is that they're not going to answer that question right now. But unofficially, and off the record, I think many officers will tell you that they blame the media, particularly the local media, for the tragedy that occurred here. They think the fact that both the newspaper and the local television station, who were already at the compound, some of whom were reporters for, I believe, the TV station, allegedly were already hiding in the trees when federal agents arrived. And that was the first indication that many of them had that they had been set up, and that's a strong belief I think they have that they have not shared publicly yet, is that they think they were set up.

Appendix C

KOPPEL: Set up by whom?

FAIR: My sources have told me they think they were set up by at least one reporter and perhaps one local law enforcement official.

KOPPEL: Now, when they say "set up," Kathy, what do they mean by set up in this instance?

FAIR: That they were aware of the raid that had been planned by the federal agents, and that they had tipped off the sect about it, and that that is how they got permission to be on the grounds before the federal agents arrived.

As soon as the Nightline broadcast concluded, KWTX began to receive calls critical of McLemore's role in the raid. Even though Fair did not identify him by name, many callers immediately believed that she was referring to him and that he was responsible for the disastrous results of the ATF raid. WFAA picked up the story and broadcast reports by Williams the next day during both its 6:00 p.m. and 10:00 p.m. news shows. At 6:00, the station showed the following report:[1]

[ANCHORS]: (Glor) As the standoff moves into its fourth day, one very troubling scenario is brought up again and again. ATF officials resolutely say the agents in Sunday's raid were set up. (John) What is

1. WFAA attached transcripts of Williams' reports shown on its 6:00 and 10:00 news shows. We have reproduced those transcripts with some punctuation and capitalization changes. We have also bracketed in the significant video portions of the reports.

alleged is that an hour before the raid, someone called the cult compound. The question is who was that person? And perhaps more troubling, could it have been a reporter from the Waco media. Or are federal officials trying to shift the blame for what some call a poorly planned operation. Channel 8's Valeri Williams has more.

[Video: Excerpt from a news conference by representatives of the ATF and the FBI was played showing the following exchange:

Reporter: Do you know who the phone call was from?

ATF spokesman: No, we don't.

Reporter: There has been a report that this may have come from the media. Do you suspect it was a media tipoff?

ATF spokesman: We don't have any information on that.]

[WILLIAMS]: At a morning news conference in Waco federal officials were unwilling to place any public blame. But what has these journalists concerned is this Nightline interview with Houston Chronicle reporter Kathy Fair.

[Video: Excerpt from the portion of Nightline quoted above, where Koppel asks Fair "what do they mean by set up" and Fair replies "That they were aware of the raid that had been

planned by the federal agents, and that they had tipped off the sect about it, . . ."]

> [WILLIAMS]: Fair goes on to say that her ATF sources saw reporters hiding in trees at the compound before the attack was to begin.

[Video: Footage of McLemore, apparently on the compound grounds, saying "and then the next thing you know. . there's bullets coming out of the house . . . ."]

> [WILLIAMS]: The only reporters at the scene Sunday morning were Steve [sic] McLemore and a television photographer from KWTX-TV in Waco and one or two reporters from the local newspaper. McLemore's news unit was used to transport some of the wounded agents. Currently his bosses are consulting with attorneys before issuing a statement. But the editor-in-chief of the Waco Tribune Herald issued this statement: "I do not know what local reporter that was being referred to, but it sounds absolutely ridiculous to me. Our reporters would not do such a thing."

[Video: Excerpt from a Cable Network News broadcast, in which David Koresh, the leader of the Branch Davidians, states "I knew they were coming. I knew they were coming before they knew they were coming."]

> [WILLIAMS]: Another scenario is that perhaps one of ATF's own informants accidentally tipped David Koresh off. Federal authorities acknowledge that they had infiltrated the cult. And that shortly before

> the ill-fated raid began their own man slipped out. Koresh says the agent's name was Richard Robert Gonzales.

[Video: Second excerpt from CNN, in which Koresh states "So what happened was Robert came in and sat down course I look him in the eyes and I say, 'Robert, you know I love you and I've shown you truth. It's right here out of your Bible. Now you have to deal with what I showed you.' "]

> [WILLIAMS]: Now perhaps all of the warning signs were there that this raid was a set up. If it's true that reporters were spotted hanging from trees why didn't authorities stop the raid before agents ever went through the front door? On the other hand, if reporters covertly tipped the cult off to gain a story not only have they broken every journalistic ethic but they could be found guilty of obstruction of justice.
>
> Valeri Williams, Channel 8 News.

At 10:00 p.m., WFAA broadcast a similar piece:

> [ANCHOR]: ATF officials have insisted the raid went awry because they lost the element of surprise. They say the cult was tipped off by a phone call one hour before their strike. The question has been who would have made that call? Last night on ABC's Nightline accusations were made against the local media in Waco. More on the story from Channel 8's Valeri Williams.

Appendix C

[Video: Excerpt from the Nightline broadcast featuring Fair's statement "My sources have told me they think they were set up by at least one reporter and perhaps one local law enforcement official."]

> [WILLIAMS]: It is this interview with Houston Chronicle reporter Kathy Fair that has stirred a storm of controversy. Fair told Nightline's Ted Koppel when ATF sources arrived at the compound they saw Waco television reporters "hiding in the trees". Fair then makes this revelation:

[Video: Second Nightline excerpt showing Fair stating "they were aware of the raid that had been planned by the federal agents, and that they had tipped off the sect about it, and that that is how they got permission to be on the grounds before the federal agents arrived." Apparently, a video showing McLemore at the scene of the gunfight played during Williams' comments that follow.]

> [WILLIAMS]: Now the only reporters at the scene Sunday morning were John McLemore and a photographer from KWTX-TV in Waco along with one or two reporters from the local newspaper. McLemore's news unit was used to transport some of the wounded agents. Wednesday night McLemore's station is demanded [sic] a retraction from Nightline saying, "the rumor that a Waco reporter had tipped the cult about the raid in exchange for permission to be on the compound grounds was completely false. No reporter or photographer from local media was on the compound grounds prior to the raid." The Waco

Appendix C

> Tribune Herald has also called the charges "ridiculous." Nightline's answer: "We are looking at the charges with our legal department and have no response tonight."

[Video: Footage from the press conference held by federal authorities in which a reporter asks "There has been a report that this may have come from the media. Do you suspect it was a media tipoff?"]

> [WILLIAMS]: Despite repeated questions at their news conference federal officials were unwilling to place any public blame. Now perhaps all of the warning signs were there that this raid was a set up. If it's true that reporters were spotted hanging from trees why didn't authorities stop the raid before agents ever went through the front door? On the other hand, if reporters covertly tipped the cult off to gain a story not only have they broken every journalistic ethic but they could be found guilty of obstruction of justice.
>
> Valeri Williams, Channel 8 News.

MOTIONS FOR SUMMARY JUDGMENT

Fair and the *Chronicle* sought a summary judgment on five grounds: (1) the statements were substantially true; (2) Fair's statements were not "of and concerning" McLemore; (3) her statements were privileged; (4) lack of actual malice on Fair's part; and (5) the "false light" claim was not actionable under Texas law. WFAA also moved for a summary judgment, raising six grounds: (1) no defamatory meaning; (2) fair report

privilege; (3) fair comment privilege; (4) truth; (5) no actual malice; and (6) neutral reporting privilege. WFAA supported its motion with Williams' affidavit, transcripts from the March 2 Nightline show, transcripts of Williams' reports from its March 3 6:00 p.m. and 10:00 p.m. news shows, affidavits from three law enforcement personnel, and excerpts from McLemore's deposition. The court granted the *Chronicle* and Fair a take-nothing summary judgment, but denied WFAA's motion.

THE APPEAL

WFAA appeals under the provisions of the Civil Practice and Remedies Code allowing for an appeal from the denial of a motion for summary judgment when the motion is based on a defense by a member of the electronic media arising under the First Amendment. TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(6) (Vernon 1987). It reduces the six grounds raised in the trial court to four: (1) no defamatory meaning; (2) truth; (3) no actual malice; and (4) the statements were privileged.

CONTROLLING LAW

STANDARD OF REVIEW

We apply the same standard of review to the court's denial of WFAA's motion for a summary judgment as we would if the court had granted the motion. *San Antonio Express News v. Dracos,* 922 S.W.2d 242, 247 (Tex.App — San Antonio 1996, no writ); *Holder v. Porter,* 845 S.W.2d 442, 444 (Tex.App.— Waco 1993, no writ); *see also Casso v. Brand,* 776 S.W.2d 551, 556 (Tex.1989); *Freedom Communications, Inc. v. Brand,* 907 S.W.2d 614, 617-18 (Tex.App. — Corpus Christi 1995, no

writ). Thus, WFAA must show there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management,* 690 S.W.2d 546, 548-49 (Tex.1985); *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671, 678 (Tex.1979). We must accept as true all evidence favoring McLemore, indulging every reasonable inference which favors him and resolving any doubts in his favor. *Nixon,* 690 S.W.2d at 548-49. To prevail, WFAA, as the defendant, must disprove at least one essential element of each of McLemore's pleaded causes of action or otherwise show he cannot succeed on any of his asserted theories. *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 476-77 (Tex.1995). If WFAA establishes its right to judgment as a matter of law, the burden shifts to McLemore to raise a fact issue precluding summary judgment. *Centeq Realty, Inc. v. Siegler,* 899 S.W.2d 195, 197 (Tex.1995); *Casso,* 776 S.W.2d at 556. However, our review is limited to those issues expressly presented to the trial court by WFAA as a ground for granting the summary judgment and reasserted before this court. *McConnell v. Southside School Dist.,* 858 S.W.2d 337, 339 (Tex.1993).

Defamation

A cause of action for defamation is made out when the plaintiff shows that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with, depending on the status of the plaintiff, either actual malice or negligence regarding the truth of the statement. *Carr v. Brasher,* 776 S.W.2d 567, 569 (Tex.1989); *Einhorn v. LaChance,* 823 S.W.2d 405, 413 (Tex.App. — Houston [1st Dist.] 1992, writ dism'd w.o.j.). A statement is defamatory if it tends to injure a person's reputation, exposing the person to

public hatred, contempt, ridicule, or financial injury. *Free v. American Home Assur. Co.*, 902 S.W.2d 51, 54 (Tex.App. — Houston [1st Dist.] 1995, no writ); *Einhorn*, 823 S.W.2d at 410-11.

PRIVATE PERSON v. PUBLIC FIGURE

Where the plaintiff is a public official or public figure, the First Amendment requires that the plaintiff show the defendant acted with actual malice before liability may be imposed. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094 (1967); *New York Times Company v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). If, on the other hand, the plaintiff is a private person, liability for actual damages may be constitutionally imposed when the plaintiff shows some lower level of fault. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974). In Texas, a private person may recover actual damages from a publisher or broadcaster on a showing that the defendant knew or should have known that the defamatory statement was false, *i.e.*, a showing that the defendant was negligent with regard to the falsity of the statement. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex.1976).

Thus, the first step in our analysis is to determine McLemore's status. WFAA has alleged that McLemore is a public figure, and McLemore has not contested that label. However, because this is a summary judgment proceeding, WFAA must sustain the burden of conclusively establishing McLemore's status, and his failure to contest the label cannot suffice. *See McConnell*, 858 S.W.2d at 343; *Guinn v. Texas Newspapers, Inc.*, 738 S.W.2d 303, 304-05 (Tex.App.— Houston [14th Dist.] 1987, writ denied).

Appendix C

Public figures, for defamation purposes, come in two categories. The first type, a general purpose public figure, is an individual who has "achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Gertz*, 418 U.S. at 351, 94 S.Ct. at 3013. The second type, a limited-purpose public figure, is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* Such a person has "thrust himself into the vortex of [a] public issue, [or has] engage[d] the public's attention in an attempt to influence its outcome." *Id.*, 418 U.S. at 352, 94 S.Ct. at 3013. One court has observed that "[d]efining public figures is much like trying to nail a jellyfish to the wall," a sentiment that has been echoed several times since. *Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440, 443 (S.D.Ga.1976), *aff'd*, 580 F.2d 859 (5th Cir.1978); *see, e.g., Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 433 (5th Cir.1987); *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C.Cir.1987) (en banc); *Chevalier v. Animal Rehabilitation Center, Inc.*, 839 F.Supp. 1224, 1234 (N.D.Tex.1993).

However, the Fifth Circuit has adopted a three-step test for determining whether a person is a limited-purpose public figure. *Trotter*, 818 F.2d at 433-34 (citing *Tavoulareas*, 817 F.2d at 772-73). At least one Texas Court of Appeals has incorporated the test into Texas law. *Einhorn*, 823 S.W.2d at 413. To find that the plaintiff is a limited-purpose public figure, the Fifth Circuit suggests that we must affirmatively answer each of these elements:

> (1) The controversy at issue was public both in the sense that people were discussing it and people other than the immediate participants in the

controversy were likely to feel the impact of its resolution;

(2) the plaintiff had more than a trivial or tangential role in the controversy; and

(3) the alleged defamation was germane to the plaintiff's participation in the controversy.

Id.; Trotter, 818 F.2d at 433-34.[2] We will also apply this test, bearing in mind, however, that the determination cannot be made by the mechanical application of general rules. *Trotter*, 818 F.2d at 433.

THE CONTROVERSY

The Branch Davidian raid is clearly a public controversy within both of the considerations involved in the first element. But was this the controversy that applied to McLemore? We think not. The defamatory nature of the present case arises from the controversy surrounding the ethics of McLemore's journalistic standards as applied to his alleged activities. Even though McLemore's employment has as its subject a constant stream of newsworthy events, his journalistic standards are at issue — affecting him as a private person in his profession.

McLemore's employer assigned him to cover the Branch Davidian raid as it could have assigned any of its other reporters. Nothing in the present record establishes that he voluntarily injected himself or that he attempted to influence the outcome of that raid. *Gertz*, 418 U.S. at 351-52, 94 S.Ct. at 3013; *Foster*, 541 S.W.2d at 816-17.

---

2. Neither the United States Supreme Court nor the Texas Supreme Court has adopted this test.

The controversy at issue was not a public one because it involved McLemore's personal ethical standards as a journalist. *See Trotter*, 818 F.2d at 433. Thus, the manner in which McLemore reported on the ATF raid was not a public issue into which he "thrust himself." *Gertz*, 418 U.S. at 351-52, 94 S.Ct. at 3013. Because WFAA's report on McLemore's ethics did not address a matter of public concern, McLemore retained his status as a private individual.

CONCLUSION

As a private individual, McLemore's standard of proof is negligence as to WFAA. Because WFAA has not asserted a right to summary judgment on that standard, the issue is not before us. *McConnell*, 858 S.W.2d at 343; *Guinn*, 738 S.W.2d at 306. We affirm the trial court's denial of the Motion for Summary Judgment by WFAA-TV, Inc. We remand this cause to the trial court for further proceedings consistent with this opinion.

APPENDIX D — ORDER OF THE DISTRICT COURT, MC LENNAN COUNTY, TEXAS, 74TH JUDICIAL DISTRICT DENYING MOTION FOR SUMMARY JUDGMENT BY WFAA-TV, INC. DATED JANUARY 22, 1996

IN THE DISTRICT COURT
McLENNAN COUNTY, TEXAS
74th JUDICIAL DISTRICT

Cause No. 94-614-3

John McLemore

Plaintiff

v.

Kathy Fair, The Hearst Corporation d/b/a The Houston Chronicle, and WFAA-TV, Inc.,

Defendants

ORDER DENYING MOTION FOR SUMMARY JUDGMENT BY WFAA-TV, INC.

ON THIS DAY the Court considered and ruled upon the Motion for Summary Judgment by WFAA-TV, Inc., a Defendant in this cause, oral argument having previously been conducted as to this Motion. Having considered the Motion for Summary Judgment by WFAA-TV, Inc., Plaintiff's response to that Motion, and the argument of counsel, the Court is of the opinion that genuine issues of material fact remain unresolved, and that the Motion should be denied.

Appendix D

IT IS THEREFORE ORDERED that the Motion for Summary Judgment by WFAA-TV, Inc., a Defendant in this cause, be, and it is hereby, DENIED.

SIGNED this 22 day of January, 1996.

s/ S/
JUDGE PRESIDING

APPENDIX E — LETTER ORDER OF THE SUPREME COURT OF TEXAS OVERRULING THE MOTION FOR REHEARING DATED NOVEMBER 12, 1998

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (514) 463-1312

November 12, 1998

* * *

RE: Case Number 97-0868
Court of Appeals Number: 10-96-00033-CV
Trial Court Number: 94-614-3

Style: WFAA-TV, INC.
v.
JOHN McLEMORE

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause. The court of appeals' opinion is ordered published pursuant to TEX. R. APP. P. 47.3(d).

Sincerely,

John T. Adams, Clerk

by s/ Michael H. Kopp
Michael H. Kopp, Deputy

Appendix E

cc: The Hon. B. B. Schraub
Ms. Imogene Allen, Clerk
Mr. Joe Johnson
The Honorable Rex D. Davis, Chief Justice
Honorable Alan M. Mayfield

APPENDIX F — TRANSCRIPT OF WFAA SEGMENT #1 (SUBMITTED TO TRIAL COURT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED BY WFAA-TV, INC.)

* * *

!m=Wed Mar 3 22:04 1993

* * *

tracy live	>>>A-T-F OFFICIALS HAVE INSISTED THE RAID WENT AWRY BECAUSE they lost the element of surprise. THEY say the cult was tipped off by a phone call ONE HOUR BEFORE THEIR STRIKE. THE QUESTION HAS BEEN... WHO would have MADE THAT CALL? LAST NIGHT ON ABC'S NIGHTLINE... ACCUSATIONS WERE MADE AGAINST THE LOCAL MEDIA IN WACO. MORE ON THE STORY FROM CHANNEL 8'S VALERI WILLIAMS.....
sovt/s: banner super:"what role did media play?"	{----------}
S: "NIGHTLINE" S: VALERI WILLIAMS/ REPORTING	

Appendix F

S: KATHY FAIR/HOUSTON
CHRONICLE
S: SUNDAY
S: WACO
S:VALERI WILLIAMS/
WFAA-TV REPORTING

runs:

[1]

* * *

Last Modified
Wed Mar 3 21:32 1993

* * *

>>> A-T-F OFFICIALS HAVE INSISTED THROUGHOUT THIS ORDEAL THAT THE RAID WENT AWRY BECAUSE SOMEONE CALLED AND TIPPED OFF THE CULT COMPOUND.

THE CALL, A-T-F OFFICIALS SAY, CAME ONLY ONE HOUR BEFORE THEIR STRIKE.

THE QUESTION HAS BEEN. . . WHO MADE THAT CALL?

LAST NIGHT ON ABC'S NIGHTLINE. . .

Appendix F

ACCUSATIONS WERE MADE AGAINST THE LOCAL MEDIA IN WACO. MORE ON THE STORY FROM CHANNEL 8'S VALERI WILLIAMS. . . . . {----------}

SOVT:

S: "NIGHTLINE"

S: VALERI WILLIAMS/ REPORTING

S: KATHY FAIR/HOUSTON CHRONICLE

S: SUNDAY

S: WACO

S:VALERI WILLIAMS/ WFAA-TV REPORTING

>>>(UP NATS — NIGHTLINE) {1/52:02} my sources tell me they believe they were set up by one local reporter and one local law enforcement official.

IT IS THIS INTERVIEW WITH HOUSTON CHRONICLE REPORTER KATHY FAIR THAT HAS

Appendix F

STIRRED A STORM OF CONTROVERSY.

FAIR TOLD NIGHTLINE'S TED KOPPEL WHEN A-T-F SOURCES ARRIVED AT THE COMPOUND THEY SAW WACO TELEVISION REPORTERS "HIDING IN THE TREES".

FAIR THEN MAKES THIS REVELATION:

(FAIR) {1/52:15} they were aware of the raid planned by federal agents and that that they had tipped off the sect about it. and that is how they got permission to be on the grounds before the federal agents arrived.

(UP NATS — John mclemore)

NOW THE ONLY REPORTERS AT THE SCENE [2] SUNDAY MORNING WERE JOHN MCLEMORE AND A PHOTOGRAPHER FROM KWTX-TV IN WACO. . ALONG WITH ONE OR TWO REPORTERS FROM THE LOCAL NEWSPAPER.

MCLEMORE'S NEWS UNIT WAS USED TO

Appendix F

TRANSPORT SOME OF THE WOUNDED AGENTS.

wednesday night MCLEMORE'S STATION IS DEMANDed A RETRACTION FROM NIGHTLINE. . .

SAYING, "the rumor that a waco reporter had tipped the cult about the raid in exchange for permission to be on the compound grounds was completely false.

no reporter or photographer from local media was on the compound grounds prior to the raid."

THE WACO TRIBUNE HERALD HAS ALSO CALLED THE CHARGES "RIDICULOUS".

NIGHTLINE'S ANSWER : "we are looking at the charges with our legal department and have no response tonight."

{tape 2}

(up nats — waco news conference)

{2/8:15} there has been a report that this may have come from the media. . do suspect it was a media tipoff?

Appendix F

DESPITE REPEATED QUESTIONS. . AT THEIR news conference FEDERAL OFFICIALS WERE UNWILLING to PLACE ANY public BLAME.

(STANDUP) NOW PERHAPS ALL OF THE WARNING SIGNS WERE THERE THAT THIS RAID WAS A SET UP.

IF IT'S TRUE THAT REPORTERS WERE SPOTTED HANGING FROM TRESS. . . WHY DIDN'T AUTHORITIES STOP THE RAID BEFORE AGENTS EVER WENT THROUGH THE FRONT DOOR?

ON THE OTHER HAND, IF REPORTERS COVERTLY TIPPED THE CULT OFF TO GAIN A STORY. . . NOT ONLY HAVE THEY BROKEN EVERY JOURNALISTIC ETHIC. . . BUT THEY COULD BE FOUND GUILTY OF OBSTRUCTION OF JUSTICE.

VALERI WILLIAMS, CHANNEL 8 NEWS.

APPENDIX G — TRANSCRIPT OF WFAA SEGMENT #2 (SUBMITTED TO TRIAL COURT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED BY WFAA-TV, INC.)

* * *

Last Modified
Wed Mar 3 18:03 1993

* * *

2-shot

>>> (GLOR)
AS THE STANDOFF MOVES INTO ITS FOURTH DAY, ONE VERY TROUBLING SCENARIO IS BROUGHT UP AGAIN AND AGAIN.
A-T-F OFFICIALS RESOLUTELY SAY THE AGENTS IN SUNDAY'S RAID WERE SET UP.
(JOHN)
WHAT is ALLEGED IS THAT an hour BEFORE THE RAID, someone CALLED THE CULT COMPOUND.
THE QUESTION IS. . who WAS THAT PERSON??
(TURN)
AND PERHAPS MORE TROUBLING, COULD IT HAVE BEEN A REPORTER FROM THE WACO MEDIA. . OR ARE FEDERAL

(TURN BOX: MEDIA CRITICISM

Appendix G

OFFICIALS TRYING TO SHIFT THE BLAME FOR WHAT SOME CALL, A POORLY PLANNED OPERATION.

CHANNEL 8'S VALERI WILLIAMS HAS MORE. . . .

{----------}

sovt — [bnr] media criticism

s: waco

s:valeri williams/reporting

s: "nightline"

s: kathy fair/houston chronicle

s: valeri williams/wfaa-tv reporting

AAAAA [1]

* * *

Last Modified
Wed Mar 3 18:55 1993

* * *

>>>AS THE STANDOFF MOVES INTO ITS FOURTH DAY, ONE VERY TROUBLING SCENARIO

Appendix G

KEEPS BEING BROUGHT UP.

A-T-F OFFICIALS RESOLUTELY SAY THE AGENTS IN SUNDAY'S RAID WERE SET UP.

WHAT is ALLEGED IS THAT an hour BEFORE THE RAID TOOK PLACE someone CALLED THE CULT COMPOUND.

THE QUESTION IS. . who WAS THAT PERSON. . .

AND PERHAPS MORE TROUBLING, COULD IT HAVE BEEN A REPORTER FROM THE LOCAL WACO MEDIA. . OR ARE FEDERAL OFFICIALS TRYING TO SHIFT THE BLAME FOR AN ILL-PLANNED ATTACK?

CHANNEL 8'S VALERI WILLIAMS HAS MORE. . . .

{----------}

>>>(newsconference) {2/8:15} do you know who the phone call was from? no we don't. there has been a report that this may have come from the media. . do you suspect it was a media tipoff?

we don't have any information on that. . . . . .

NIGHTLINE

AT A MORNING NEWS CONFERENCE IN WACO FEDERAL OFFICIALS WERE UNWILLING TO PLACE ANY public BLAME. . . . BUT WHAT HAS THESE JOURNALISTS CONCERNED IS THIS NIGHTLINE INTERVIEW WITH HOUSTON CHRONICLE REPORTER KATHY FAIR.

(fair){1/52:02} my sources tell me they believe they were set up by one local reporter and one local law enforcement official.

koppel: when they say set up kathy. . what do they mean by that?

kathy: that they were aware of the raid that had been planned by federal agents and that they had tipped off the sect about it.

FAIR GOES ON TO SAY THAT HER A-T-F SOURCES SAW REPORTERS HIDING IN TREES AT THE COMPOUND BEFORE THE ATTACK WAS TO BEGIN.

Appendix G

[2] (corrected reporters name for the record. . script said "steve" although we never say nor super his name in story)	(UP NATS — John MCLEMORE) {4:8:30} and then the next thing you know. . there's bullets coming out of the house. . . .

	THE ONLY REPORTERS AT THE SCENE SUNDAY MORNING WERE STEVE MCLEMORE AND A TELEVISION PHOTOGRAPHER FROM KWTX-TV IN WACO AND ONE OR TWO REPORTERS FROM THE LOCAL NEWSPAPER.
	MCLEMORE'S NEWS UNIT WAS USED TO
shots of wounded agents	TRANSPORT SOME OF THE WOUNDEd agents.
	CURRENTLY HIS BOSSES ARE CONSULTING WITH ATTORNEYS BEFORE ISSUING A STATEMENT.
	BUT THE EDITOR-IN-CHIEF OF THE WACO
shot of outside of newspaper on feed tape	TRIBUNE HERALD ISSUED THIS STATEMENT:
	"i do not know what local reporter that was being referred to, but it sounds absolutely ridiculous to me. our reporters would not do such a thing.
graphix	---

Appendix G

cnn interview	(UP NATS — KORESH/CNN) {5/36:05} I knew they were coming. i knew they were coming before they knew they were coming.
	---
vid of scene	ANOTHER SCENARIO IS THAT PERHAPS ONE OF A-T-F'S OWN INFORMANTS ACCIDENTALLY TIPPED DAVID KORESH OFF.
(today's newsconf. vid) {tape 2}	FEDERAL AUTHORITIES ACKNOWLEDGE THAT THEY HAD INFILTRATED THE CULT. . AND THAT SHORTLY BEFORE THE ILL-FATED RAID BEGAN. . THEIR OWN MAN SLIPPED OUT. KORESH SAYS THE AGENT'S NAME WAS RICHARD ROBERT GONZALES.
	---
cnn	(UP NATS — KORESH/CNN) {5/35:38} so what happened was. . robert came in and sat down. . course i look him in the eyes and i say, "robert, you know i love you and i've shown you truth. it's right here out of your bible. now you have to deal with what i showed you."

Appendix G

(STANDUP) NOW PERHAPS ALL OF THE WARNING SIGNS WERE THERE THAT THIS RAID WAS A SET-UP.

IF IT'S TRUE THAT REPORTERS WERE SPOTTED HANGING FROM TREES... WHY DIDN T AUTHORITIES STOP THE RAID BEFORE AGENTS EVER WENT THROUGH THE FRONT DOOR?

ON THE OTHER HAND, IF REPORTERS COVERTLY TIPPED THE CULT OFF TO GAIN A STORY... NOT ONLY HAVE THEY BROKEN EVERY JOURNALISTIC ETHIC... BUT THEY [3] COULD BE FOUND GUILTY OF OBSTRUCTION OF JUSTICE.

VALERI WILLIAMS, CHANNEL 8 NEWS.

APPENDIX H — AFFIDAVIT OF JOHN MC LEMORE (SUBMITTED TO TRIAL COURT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY WFAA-TV, INC.)

STATE OF TEXAS
COUNTY OF McLENNAN

AFFIDAVIT OF JOHN McLEMORE

BEFORE ME, the undersigned authority, this day personally appeared John McLemore, who upon his oath deposed as follows:

1. "My name is John McLemore. I am a resident of McLennan County, Texas. I am over twenty-one (21) years of age, have never been convicted of a felony or misdemeanor involving moral turpitude, and am fully competent to execute this Affidavit. The matters set forth in this Affidavit are based upon my personal knowledge.

2. "I was an employee of KWTX Television in Waco, Texas, during February 1993 and March 1993. I started work for KWTX in 1987. I worked as a reporter, and was working as a reporter in February 1993 and March 1993.

3. "I was instructed on Saturday, February 27, 1993, to report for work early the following morning, which was Sunday, February 28, 1993. Prior to arriving at work on Sunday, February 28, 1993, I was not told what story I would be covering, and I did not know what story I would be covering. I gained that information after arriving at the station,

where I learned for the first time that I was assigned to cover an expected raid by law enforcement agents on the Branch Davidian compound.

4. "I am personally acquainted with Shawn Welch. I have known him since at least 1991.

5. "On the evening of Saturday, February 27, 1993, my wife and I accompanied Shawn Welch to a popular nightclub in Waco, Texas, called "Cody's".

6. "During the time I was at Cody's, I drank one beer. I was in no way intoxicated or obviously affected by consuming this one beer.

7. "At no time did I indicate to my wife or to Shawn Welch or to anyone else who might have been present at Cody's that there was about to be a major law enforcement operation of any sort, and I certainly did not indicate or suggest in any way that the ATF was about to conduct a raid on the Branch Davidian compound. I could not have said anything like that, because I did not know.

8. "On the morning of Sunday, February 28, 1993, I was indeed present, along with my cameraman, Dan Mulloney, near the Branch Davidian compound. Our vehicle was unmarked. At not time prior to the arrival of ATF agents and the commencement of the raid did we go onto the grounds of the Branch Davidian compound. We did not make contact with anyone at the compound prior to or at the time of the ATF raid.

9. "At no time prior to the arrival of ATF agents and the commencement of the raid did I tell anyone associated with the Branch Davidians that a raid by the ATF or any other law enforcement agency was imminent; neither did my cameraman, Dan Mulloney.

10. "At no time prior to the arrival of ATF agents and the commencement of the raid did I contact anyone associated with the Branch Davidians and request permission, or obtain permission, to be on the grounds of the compound prior to the arrival of the ATF agents. To have done so, which I did not, would indeed be a breach of journalistic ethics, in my opinion. To have done so, which I did not, could indeed, as I understand it, constitute obstruction of justice, a criminal offense.

11. "I was not present on the grounds of the compound prior to or at the time of the arrival of the ATF agents, and neither was my cameraman, Dan Mulloney.

12. "I was not hanging from or hiding among the trees on the grounds of the compound prior to or at the time of the arrival of the ATF agents, and neither was my cameraman, Dan Mulloney.

13. "The arrival of National Guard helicopters and two cattle trailers filled with armed ATF agents indicated to me that a raid was indeed about to begin. Dan Mulloney and I were approximately one-half mile from the compound at the time, near the

intersection of Elk Road and Double E Ranch Road. We jumped into our vehicle and followed the cattle trailers onto the grounds of the compound. A furious gunfight erupted, with automatic weapons fire pouring out of the compound itself. No other journalists were present on the grounds of the compound; some local journalists were apparently prone in a ditch out on the roadway at this time, seeking shelter from the gunfire.

14. "Because of the gunfire, Dan Mulloney and I sought cover behind an old bus. We shot film of the raid and the gunfight. One of the ATF agents called to me and asked that I call for assistance; I ran to my vehicle and did so. I was surprised to see that gunfire was even being directed at me, or at least coming my way, while I ran toward the vehicle; a round struck the vehicle as I was opening the door.

15. "A cease-fire was eventually accomplished, and the ATF agents retreated. Dan Mulloney and I helped evacuate some of the wounded ATF agents. All of the ATF agents at the scene were, understandably enough, visibly upset to one degree or another. Some expressed gratitude for our help. Some expressed anger that we were even there.

16. "I reported live from the scene, and continued in general to cover the story. I was the only television news reporter on the scene at the time, and the only television news reporter broadcasting at the scene at the time. Within a few hours there were many television news reporters present, but I

was the first. I was contacted by news organizations from all over the country during the hours and days following the raid, and I provided information to them. I saw that the film footage obtained by Dan Mulloney and myself was being broadcast repeatedly all over the country, and even the world. This was a terrible tragedy, but as a journalist I was at least pleased to see that my coverage of this story was being broadcast to a wide audience. My family, friends and colleagues all expressed approval of the job I had done.

17. "On the evening of March 2, 1993, ABC TV's *Nightline* included an interview with Kathy Fair. During the course of that interview, Kathy Fair made various statements regarding the role of the media in the failure of the ATF raid.

18. "After this broadcast and the statements by Kathy Fair, KWTX TV, my employer, received numerous telephone calls. Many of the callers were viewers in the Waco area who had seen Kathy Fair on *Nightline*, calling to express their outrage.

19. "I was identified personally by many callers as the source of their outrage.

20. "These calls continued for several days.

21. "Ever since the *Nightline* broadcast of March 2, 1993, I have heard people in the McLennan County area commenting upon how outraged they were by what I had supposedly done. I have found

myself defending my ethics and reputation when confronted by such comments and criticisms. I have received telephone calls from people who do not live in this community who expressed the same sentiment. Everyone appeared to believe, after the *Nightline* broadcast, that I had contacted the Branch Davidians and told them about the raid in advance so I could gain permission to be in a good spot on the grounds of the compound when the ATF agents arrived.

22. "When I saw and heard the *Nightline* broadcast, and the remarks by Kathy Fair, I believed that she was referring to me. So did my wife. So did many of my friends and colleagues. So obviously did many members of the community. This is not surprising, since my face was so closely associated with the raid, having obtained the film footage of the raid in progress and having broadcast live from the scene shortly after the initial raid.

23. "On March 3, 1993, Valeri Williams, a reporter for WFAA-TV (Channel 8), Dallas, Texas, repeated the remarks of Kathy Fair from the *Nightline* broadcast. Ms. Williams specifically identified me, to include pictures of me near the compound shortly after the initial raid and retreat by ATF agents.

24. "Ms. Williams' broadcast left absolutely no doubt who had supposedly contacted the Branch Davidians in advance to gain permission to be on the property. What Ms. Fair started, Ms. Williams continued. I found myself defending and explaining myself to family, friends, colleagues and other

members of the community regarding Ms. Williams' broadcast as well.

25. "I have been humiliated by the statements of Ms. Fair and Ms. Williams., and I believe my personal and professional reputation in this community have been destroyed or severely damages as a result of their stories.

26. "The claim that I intentionally tipped off the Branch Davidians to obtain permission to be on the grounds of the compound at the time of the raid is completely false.

27. "The claim that I tipped off the Branch Davidians at all is completely false.

28. "The claim that I was hanging out of the trees on the grounds of the compound at the time the raid commenced is completely false."

s/ John McLemore
JOHN McLEMORE

SUBSCRIBED AND SWORN to before me this 18th day of August, 1995.

s/ Anita A. Overstreet
NOTARY PUBLIC STATE OF TEXAS

[stamp]
ANITA A. OVERSTREET
Notary Public
STATE OF TEXAS
My Commission Expires 10/16/97

APPENDIX I — DEPOSITION EXCERPT OF JOHN MC LEMORE (SUBMITTED TO TRIAL COURT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY WFAA-TV, INC.) (RELATING TO SUPPOSED "PRESS CONFERENCE" INVOLVING JOHN MC LEMORE)

[commencing at page 122]

* * *

Q. Do you remember — All right. Now, you were — You were interviewed by members of the news media beginning on the day of the raid; isn't that correct?

A. That's correct.

Q. And probably the first member of the news media who interviewed you in any sense would have been Brad Watson from Channel 8; is that correct?

A. That's correct.

Q. He was the anchor in the studio in Dallas, and you were reporting live from the scene?

A. That's correct.

Q. Okay. And he spoke to you and you reported and you answered questions and so forth?

[123] A. Yes, I did.

Q. Okay. You spoke to other members of the news media that day; isn't that correct?

A. That's correct.

Q. You spoke to newspaper reporters or wire service reporters?

A. I'm not sure. I talked to a whole flock of reporters once I came back to a certain point.

Q. Did you hold a press conference?

A. I didn't call one myself, but the —

Q. Essentially that's what happened? I mean —

A. It probably turned into one. There were 10 or 15 different people with microphones.

Q. What I'm trying to understand is was there one occasion in which you spoke to an assembled group of members of the news media, or was it just throughout the day there would be a reporter here, a reporter there and then later on another reporter that you spoke to about all of this?

A. It mainly happened at that one particular time, and then, I believe, over the next 24 hours I probably did a couple of different interviews, mainly one particular incident.

* * * *

APPENDIX J — DEPOSITION EXCERPT OF JOHN MC LEMORE (SUBMITTED TO TRIAL COURT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY WFAA-TV, INC.) (RELATING TO ABILITY OF JOHN MC LEMORE TO RESPOND TO ALLEGATIONS MADE BY WFAA-TV, INC.)

[commencing at page 247]

* * *

Q.

No one from Channel 8 ever told you that they wouldn't report on any response that you might have to [248] these allegations that arose; is —

A. That's correct.

Q. — that correct? It's simply the fact that you, for whatever reason, job security or whatever, you chose not to speak out in response to the allegations?

A. Because of I did not want to lose my job.

Q. But not because of any action on the part of Channel 8 in a way that prevented you from speaking out if you had wished to?

A. That's correct.

* * * *

APPENDIX K — DEPOSITION EXCERPT OF JOHN MC LEMORE (SUBMITTED TO TRIAL COURT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY WFAA-TV, INC.) (RELATING TO PUBLICITY GENERATED BY EVENTS, AND INVOLVING JOHN MC LEMORE

[commencing at page 256]

* * *

Q. Okay. Well, I'll accept that. You may have had up to one hundred television appearances in the 24 to 48 hours after the shoot-out? I'll show you the testimony, if you'd like to see it.

A. No. That's fine.

Q. You did testify at the federal court trial in San Antonio on February 16th of this year, The United [257] States of America versus Brad Eugene Bunch and others.

A. Brad Branch, I believe it is.

Q. Branch. I'm sorry.

A. Yes.

Q. And let me show you a copy of the excerpt or proceedings before that trial. Do you see where it says, "This is the testimony of John McLemore"?

A. Yes.

Appendix K

Q. This is page 24 of the excerpt, at line 22 you're being questioned here by Mister —

A. Phinizy.

Q. — Phinizy. You heard constant automatic fire coming from inside the compound. "I don't remember it," your answer, "per se, but I'll take your word for it. I did about a hundred live shots within a 24-hour period." Is that accurate?

A. That's accurate, yes.

Q. What do you mean by "a hundred live shots"?

A. Well, I guess within a 24-hour period is exaggerating. Over that first 24 to 72 hour period, though, I did a live report about every hour on the hour for television.

Q. For your own station or for others?

A. Mainly for my own station, but there were several others.

* * * *